

event may affect the declarant for days or weeks, the other for scant moments. Excited utterances are not, however, clocked with stopwatches. Subjective factors also play a role. Testimony that the declarant was sobbing while making the statement is sufficient even where the event is such that one might normally expect the declarant to have composed him- or herself more quickly. In short, the trial court must look to the nature of the startling event and the particular facts of the case.<sup>17</sup> In *Christensen v. Economy Fire & Cas.*, the supreme court observed:

Under [Wis. Stats. § 908.03(2)] time is measured by the duration of the condition of excitement rather than mere time lapse from the event or condition described. The significant factor is the stress or nervous shock acting on the declarant at the time of the statement. The statements of a declarant who demonstrates the opportunity and capacity to review the accident and calculate the effect of his

<sup>17</sup> *State v. Mayo*, 2007 WI 78, ¶ 54, 301 Wis. 2d 642, 734 N.W.2d 115 (2007) (strong arm robbery where the court found that the victim's excited utterance was properly admitted: "We agree with the State's position that Price's out-of-court statements were properly admitted under the excited utterance exception to the hearsay rule. In talking to Officer Langendorf, Price was describing a startling event—his encounter with Mayo, during which he claimed that he was robbed and battered. Price testified that he spoke with Officer Langendorf only a few minutes after the event occurred. According to Officer Langendorf, Price was visibly upset and bleeding. Therefore, it is reasonable to conclude that Price made the statement while 'under the stress of excitement caused by the event. . . .'") (citation omitted).

*State v. Kutz*, 2003 WI App 205, ¶ 65, 267 Wis. 2d 531, 671 N.W.2d 660 (Ct. App. 2003) (summarized above).

*State v. Patino*, 177 Wis. 2d 348, 502 N.W.2d 601, 607–08 (Ct. App. 1993) (declarant's statements to police within an hour of the victim's stabbing qualified under the excited utterance exception; "time is measured by the duration of the condition of excitement rather than mere time lapse from the event described"; other testimony showed the declarant was "very excited" as he described events to police).

*State v. Boshcka*, 178 Wis. 2d 628, 496 N.W.2d 627, 630 (Ct. App. 1992) (defendant convicted of sexual assault, intimidating a victim, and assorted violent offenses; held that statements made by the victim to her job supervisor and the defendant's parole agent were properly admitted as excited utterances; with respect to the duration requirement the court clarified that the lapse is measured by the nature of the startling event, not by the "mere lapse of time," concluding that the victim's statements to the two witnesses "were made within a few hours after she had suffered repeated and aggravated assaults and had been threatened with death should she report them. Also, the statements were made to the first people [the victim] talked to following the incident. Both testified that she appeared frightened, upset and agitated as she told them of the assaults.").

Fed. R. Evid. 803(2) advisory committee's note ("Under Exception (2) the standard of measurement is the duration of the state of excitement. 'How long can excitement prevail? Obviously there are no pat answers and the character of the transaction or event will largely determine the significance of the time factor.'").

For a similar statement of authority, see Wis. Stats. § 908.03(2) Judicial Council Committee's Note.

statements do not qualify as excited utterances. Conversely, statements of declarants whose condition at the time of their declarations indicates that they are still under the shock of their injuries or other stress due to special circumstances, will be admitted under this exception. It is the condition of excitement that temporarily stills the capacity for reflection which is the significant factor assuring trustworthiness, assuring that the declarant lacked the capacity to fabricate. The court must assess the "special circumstances in which the statement is made [that] make it reliable and trustworthy."<sup>18</sup>

The temporal relationship between the startling event and the making of the statement has been most sorely tested in instances where children have reported sexual or physical abuse long after the event occurred.<sup>19</sup> Given the trustworthiness of these state-

<sup>18</sup> *Christensen v. Economy Fire & Casualty Co.*, 252 N.W.2d at 85, quoting *Cossette v. Lepp*, 38 Wis. 2d 392, 398, 157 N.W.2d 629, 632 (1968). The supreme court held that the trial court erred in excluding the victim's statements from evidence:

It is clear from the record that [the witness] arrived on the scene within minutes of the impact. Despite massive front-end damage, both vehicles were still spouting water and steam. Wroblewski [the declarant] was in pain, spitting blood, gurgling, coughing and concerned about dying. The record does not show that the court considered either the short time lapse between the event and the declaration or the extent of the victim's injuries which contributed to his shock and stress.

See *State v. Anderson*, 2005 WI 54, ¶ 59 n.11, 280 Wis. 2d 104, 695 N.W.2d 731 (2005) (quoting *Christensen* and the treatise).

<sup>19</sup> In *State v. Huntington*, 216 Wis. 2d 671, 575 N.W.2d 268, 274 (1998), the supreme court cautioned that *Gerald L.C.* [discussed below] is not a "bright-line rule." *Huntington* involved the prosecution of a step-father for sexually assaulting a child under the age of 13 years. The child made statements to her mother, sister, and a police officer. Although the child's statements did not meet all three factors set forth in *Gerald L.C.*, the court held that the statements were admissible as excited utterances. The critical

consideration appeared to be the child's highly emotional (e.g., "crying," "scared") condition when she made her statements. Citing the suggestion made in this treatise, the supreme court also analyzed the admissibility of the statements under the residual exception, 575 N.W.2d at 275. See § 803.24.

In *State v. Gerald L.C.*, 194 Wis. 2d 548, 535 N.W.2d 777 (Ct. App. 1995) the court of appeals discussed the "expansive" interpretation of the excited utterance exception in child sexual assault cases:

While we are mindful that each case must be viewed on its particular facts, a survey of Wisconsin cases that have applied the excited utterance exception to child sexual assault victims' statements reveals three common factors: (1) the child is young—under the age of ten, (2) the time between the incident and the child's report is less than a week and (3) the child first reports the incident to his or her mother. This is consistent with the rationale behind admitting such statements—that young children will tend to repress the stressful incident, will report the incident only to their mother and will be less likely than adults to consciously fabricate the incident over a period of time.

535 N.W.2d at 779-80 (citations omitted). The court held that the fourteen-year-old victim's statement to a police officer two weeks after the alleged assault did not fall within the

ments and the need for this kind of evidence in assessing the credibility of the victim, the supreme court has taken a "liberal" approach toward admitting such statements under Wis. Stats. § 908.03(2) in a distinguished and prescient line of cases. The court explained:

Subsequent to the adoption of the Wisconsin Rules of Evidence, this court has expansively applied the excited utterance exception, [Wis. Stats. § 908.03(2)], in child sexual assault cases. Though not made in immediate temporal relation to incidents which are the focal point of their statements, this court has held statements made by young children concerning sexual assault to be sufficiently contemporaneous and spontaneous to be admissible.<sup>20</sup>

Applying this approach, the court reasoned that even where the victim reported the assault months after the event itself, the nature of the assault and the pain of reporting it, especially where the offender was a member of the family, provided a sufficient basis for concluding that the declarant was still under the stress or excitement caused by the event.

In *State v. Sorenson*,<sup>21</sup> the court reaffirmed this line of cases but moved the focus of admissibility to the residual hearsay exceptions under Wis. Stats. § 908.03(24) and Wis. Stats. § 908.045(6). This does not mean that hearsay by a victim in a sexual assault case cannot fall within the excited utterance exception. Rather, it is suggested that in assessing the admissibility of hearsay in such situations the trial court should consider both avenues of admissibility. If either one, or both, are satisfied, the statements may be admitted for purposes of the hearsay rule.

Finally, even when a statement is admissible under this or another hearsay rule, the confrontation right imposes additional barriers to the State's use of hearsay against a criminal defendant. See § 802.301.

### § 908.03(3) THEN EXISTING MENTAL, EMOTIONAL, OR PHYSICAL CONDITION

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

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**(3) Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent,

exception. *Gerald L.C.* is an outlier that has arguably been severely limited. In light of *Huntington* (above), it should be applied cautiously.

226, 244-45, 421 N.W.2d 77, 84 (1988).

<sup>21</sup> *State v. Sorenson*, 143 Wis. 2d at 244-45.

<sup>20</sup> *State v. Sorenson*, 143 Wis. 2d

plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

### AUTHOR'S COMMENTS

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**§ 803.301 Then existing mental, emotional or physical condition**

This rule represents a special application of the present sense impression exception, Wis. Stats. § 908.03(1).<sup>1</sup> Wis. Stats. § 908.03(3) permits the use of a statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (hereinafter, "state of mind") to prove the declarant's mental state, physical condition, etc., at the time the statement was made. Such statements are introspective, looking inward, the declarant essentially describing her thoughts, feelings, and bodily sensations. They are highly probative when offered to prove the declarant's state of mind or physical condition. The Wisconsin rule is based on Fed. R. Evid. 803(3).<sup>2</sup>

The present state of mind exception is closely related to the circumstantial use of statements to prove the declarant's state of mind.<sup>3</sup> The difference is subtle but important. The statement "I like John" asserts that the declarant, in fact, likes John. The statement, "John and I went to a football game and had a lot of fun" invites the circumstantial inference that declarant is friendly toward John while also asserting facts about the football game. The first statement is hearsay if offered to prove that the declar-

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**[Section 803.301]**

<sup>1</sup>Wis. Stats. § 908.03(3) Judicial Council Committee's Note.

<sup>2</sup>Current Fed. R. Evid. 803(3), as restyled in 2011, states:

(3) **Then-Existing Mental, Emotional, or Physical Condition.** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

<sup>3</sup>See § 801.3.

Wis. Stats. § 908.03(3) Judicial Council Committee's Note ("Many of the decisions which developed the common law in this area failed to distinguish hearsay declarations admissible under this exception and (1) writings and utterances as operative facts or showing the effect upon the reader or hearer; (2) declarations or conduct to show circumstantially the knowledge, feelings or state of mind of the declarant. The foregoing are circumstantial evidence, not hearsay. The distinction is fine and frequently overlooked.") (citations omitted).

ant likes Bill (the truth of the matter asserted) while the second statement illustrates a circumstantial, nonhearsay use of the statement to show the very same state of mind. The exception, § 908.03(3), was created primarily to obviate definitional problems and to permit the admissibility of trustworthy evidence bearing minimal risks of misperception and faulty memory.<sup>4</sup>

The rules applies only to statements of the declarant's *then existing* state of mind, emotion, or bodily condition. It is immaterial to whom the statement was made or the motivation behind it. Such considerations go to the weight of the evidence, not admissibility. In effect, the statement must be worded in the present tense.<sup>5</sup> Declarations of *past* states of mind present all four hearsay dangers. For example, "I am feeling ill" is in the present tense and clearly complies with Wis. Stats. § 908.03(3), but the utterance, "I felt ill," describes how the declarant felt at a moment in the past.

Wis. Stats. § 908.03(3) addresses only the hearsay aspect of the evidence. The statement must, of course, be relevant, which depends upon the issues in the case and the purpose for which the statement is used.<sup>6</sup> Statements admitted under this exception may be relevant to either the declarant's "conduct" or the declarant's mental state.

A statement of a "then existing" state of mind is, of course, probative of the declarant's mental state at the time of the making of the statement. But it may also be used to show that the same mental state existed prior to, or after, the making of the statement. The probative value of the evidence for this purpose depends upon "the notion of the continuity in time of states of

<sup>4</sup>The non-hearsay use of statements to prove the declarant's state of mind are discussed at § 801.3.

<sup>5</sup>State v. Prineas, 2012 WI App 2, 338 Wis. 2d 362, 809 N.W.2d 68 (Ct. App. 2011) (sexual assault prosecution in which the sole issue was consent, the victim testifying that she repeatedly refused defendant's demands for sexual contact; held that reversible error occurred when the trial judge precluded defendant from testifying to statements made by the victim at the time which indicated consent, since such statements—if made—were inconsistent with her trial testimony and thus admissible as prior inconsistent statements, § 908.01(4)(a)1 and under the "state of mind" exception,

§ 908.03(3)); State v. Teynor, 141 Wis. 2d 187, 216, 414 N.W.2d 76, 87 (Ct. App. 1987) ("We conclude the statements were also admissible under [Wis. Stats. § 908.03(3)]. They expressed the state of mind—desire not to be at the farm and fear for their mother's safety—which each of the children had at the time the statements were made.").

<sup>6</sup>E.g., Rock v. Huffco Gas & Oil Co., Inc., 922 F.2d 272, 279, 1992 A.M.C. 302, 32 Fed. R. Evid. Serv. 1041 (5th Cir. 1991) (statement admissible under Fed. R. Evid. 803(3) must be nevertheless relevant; statement offered to show declarant's state of mind irrelevant because this mental state was not at issue).

mind.<sup>7</sup> For example, the statement "I am afraid of Jim" may be used to prove the declarant's fear of Jim at the time the statement was made and her fear both before and after it was made. The continuity may extend both backward and forward in time, relative to the point at which the statement was made. But McCormick cautions:

The duration of states of mind or emotion varies with the particular attitudes or feelings at issue and with the cause, and the court may require some reasonable indication that in light of all the circumstances, including the proximity in time, the state of mind was the same at the material time. Whether a state of mind continues is a decision for the trial judge.<sup>8</sup>

Yet the decision is one of relevancy under § 904.01. As long as the statement has some tendency to prove that the declarant's mental state continued before or after the statement was made, it is relevant and admissible, although § 904.03 considerations will also bear on admissibility.

Far more complex is the use of the state of mind exception to prove conduct. By its own terms, the rule does not permit the proponent to use a statement of memory or belief to prove the fact remembered or believed, except as discussed below concerning wills. If the declarant stated, "I am afraid of Jim because he has beaten me in the past," Wis. Stats. § 908.03(3) clearly forbids the statement's use to show that Jim had *beaten* the declarant. The statement is, however, admissible to prove the declarant's fear (not to prove the conduct that precipitated the fear).<sup>9</sup> When in doubt about why statements describing present mental states are being introduced, opposing counsel should object and force the proponent to articulate precisely what the statement is being offered to show.

Using a statement to prove the declarant's mental state but not as evidence of the events that triggered the same mental state is a commonly encountered problem of limited admissibility.

<sup>7</sup>See § 801.306 (continuity of mental states), McCormick on Evidence § 274 (7th ed.).

<sup>8</sup>McCormick on Evidence § 274 (7th ed.).

<sup>9</sup>State v. Kutz, 2003 WI App 205, 267 Wis. 2d 531, 671 N.W.2d 660, 685 (Ct. App. 2003) (citing this treatise at n.33) (trial court erred in admitting six different statements under this exception; since Wisconsin law had not yet addressed the issue, the court turned to federal cases, which have consistently construed "this rule to admit a declarant's statement of his or

her feelings to prove only how the declarant feels and not to admit a declarant's statements of the cause of those feelings to prove certain events occurred"). The *Kutz* court described the six statements in question at ¶ 55. The error occurred because the State offered the "statements Elizabeth made about Daniel's threats to her in order to prove that he threatened her" (¶ 57). Put differently, the statements looked back in time and raised the hearsay risks of the declarant's (Elizabeth) insincerity, misperception, and inaccurate memory.

To continue with the previous example, the trial judge has roughly three alternatives. First, the trial judge may redact the statement in a way that eliminates any reference to the prior beatings. Second, the judge may receive the entire statement and give the jury a limiting instruction pursuant to Wis. Stats. § 901.06.<sup>10</sup> Third, the judge may exclude the entire statement under Wis. Stats. § 904.03 because its probative value is slight as balanced against substantial dangers of unfair prejudice or confusion of the issues. The proper course will depend upon the particular facts before the court, but the first alternative best balances the need for evidence against the danger it will be misused. Where the prior conduct is innocuous, a limiting instruction may suffice. Clearly, a party's prior misconduct runs afoul of the rule governing character evidence and creates a substantial risk of unfair prejudice. Redaction is most appropriate in these instances.

For similar reasons such statements cannot be used circumstantially to show the *events or conduct* which gave rise to the declarant's mental state because this also would destroy the foundation for the hearsay rule.<sup>11</sup> To return to the example above, the statement "I am afraid of Jim" cannot be used to prove the declarant's fear to support the further inference that Jim had somehow harmed the declarant in the past.<sup>12</sup> The only exception to this rule is the "trace theory," which is discussed in conjunction with the circumstantial use of statements to prove the declarant's knowledge.<sup>13</sup>

In cases involving the execution, revocation, identification or terms of the declarant's will, Wis. Stats. § 908.03(3) allows the

<sup>10</sup>See § 106.1.

<sup>11</sup>See § 801.306 (continuity of mental states and inferences of conduct). See McCormick on Evidence § 276 (7<sup>th</sup> ed.).

<sup>12</sup>Wis. Stats. § 908.03(3) Judicial Council Committee's Note.

State v. Kutz, 2003 WI App 205, 267 Wis. 2d 531, 671 N.W.2d 660, 685 (Ct. App. 2003) (**citing this treatise** at n.33) (discussed above).

See T. Harris Young & Associates, Inc. v. Marquette Electronics, Inc., 931 F.2d 816, 827, 1991-1 Trade Cas. (CCH) ¶ 69440, 33 Fed. R. Evid. Serv. 413 (11th Cir. 1991), where plaintiff (THY) claimed that defendant (MEI) tortiously interfered with its business relationships. THY offered evidence that its employees had telephoned regional hospitals and medical

centers and were told by employees of those institutions that MEI agents had made damaging statements about the incompatibility of THY's paper and MEI's machines. The court correctly recognized that this evidence actually embraced two levels of hearsay: (1) statements by MEI agents to the hospital employees; (2) the statements by hospital employees to the THY telephone surveyors. The court held that Fed. R. Evid. 803(3) did not reach back to the first layer of hearsay because THY admitted that it was trying to prove that MEI agents made the statements; since the state of mind of the hospital employees was not at issue, the statements were irrelevant if offered only for that purpose. See generally § 805.01.

<sup>13</sup>See § 801.307.

use of statements of memory or belief to prove the fact remembered or believed. Death having rendered the declarant unavailable, this limited exception accommodates the compelling need for evidence showing what the deceased intended.<sup>14</sup>

### § 803.302 Statements of intent to prove *later* conduct in conformity: The *Hillmon* doctrine

Wis. Stats. § 908.03(3) jealously guards the hearsay rule. It applies only to statements of the declarant's then existing state of mind. Moreover, except in will cases, it precludes the use of this evidence as proof of the events or conduct which gave rise to a declarant's memory or belief.

There is, however, a sharp distinction between using state of mind evidence to prove conduct that preceded the statement and using this evidence to prove what occurred *after* it was made. The law of evidence recognizes that people usually act in conformity with their expressed intentions.<sup>1</sup> Accordingly, a statement of a present intent to do an act in the future is admissible to prove that the declarant acted in conformity.<sup>2</sup>

This doctrine weds relevancy and hearsay. The statement of a present intention to do a future act is excepted from the hearsay rule by Wis. Stats. § 908.03(3). Any form of out-of-court statement tending to show plan, design, or intention may be used to

<sup>14</sup>In re Estate of Shepherd, 2012 WI App 116, ¶ 23, 344 Wis. 2d 440, 823 N.W.2d 523 (Ct. App. 2012) (in a dispute over the probate of a will, attorney who drafted the will was properly permitted to testify to the deceased's intent in changing the will; § 908.03(3) allows statements that "look forward in time," or, in other words, can be used to prove that the declarant later acted in conformity with a certain mental state.).

Wis. Stats. § 908.03(3) Judicial Council Committee's Note (citations omitted):

Carved out of the above-mentioned exclusion is the special situation of a testator's declarations with respect to execution, revocation, identification, or terms of declarant's will. The special circumstances of necessity and trustworthiness are discussed in McCormick, Sec. 296. The admissibility of such declarations in cases involving lost wills or genuineness of signature is acknowledged in Wisconsin. Thus, this rule expands the application of the doctrine in Wisconsin but not in a fashion that is inconsistent with the

cited cases.

### [Section 803.302]

<sup>1</sup>See U.S. v. Hogan, 886 F.2d 1497, 1511–12, 29 Fed. R. Evid. Serv. 506 (7th Cir. 1989).

<sup>2</sup>In re Estate of Shepherd, 2012 WI App 116, ¶ 23, 344 Wis. 2d 440, 823 N.W.2d 523 (Ct. App. 2012) (in a dispute over the probate of a will, attorney who drafted the will was properly permitted to testify to the deceased's intent in changing the will; § 908.03(3) allows statements that "look forward in time," or, in other words, can be used to prove that the declarant later acted in conformity with a certain mental state.). State v. Everett, 231 Wis. 2d 616, ¶ 32, 605 N.W.2d 633 (Ct. App. 1999) (harmless error to exclude statement by a fellow inmate that he disliked the defendant and had threatened to persuade the victim to falsely accuse the defendant of a sexual assault) (quoting the treatise).

prove its truth, namely, the declarant had such a plan or intent when she uttered the statement.<sup>3</sup> Nonetheless, using the hearsay to infer that the declarant followed through with the plan is an issue of relevancy, not hearsay. The inference from the declarant's present intent to his later conduct involves no significant risk of misperception or faulty recollection. It is, of course, vulnerable to manipulation by the insincere declarant or the very real possibility that intervening events might have forced a change in plans, but these considerations generally run to the weight of the evidence. They do not in-and-of-themselves justify excluding the evidence.

The leading case on this subject remains *Mutual Life Ins. Co. v. Hillmon*.<sup>4</sup> Mrs. Hillmon filed a claim with the life insurance carrier under a policy covering her husband, whom she claimed was dead. A body had been found near Crooked Creek, Kansas, and Mrs. Hillmon asserted that it was that of Mr. Hillmon. The insurance company defended on the ground that the body was actually that of a man named Walters and denied the claim. To prove that the corpse was Walters', the insurance company offered a letter written by Walters stating, that he, Walters, planned to leave Wichita along with Mr. Hillmon. The trial court excluded the evidence, but the United States Supreme Court reversed, holding that the evidence was admissible

not as narrative of facts communicated to the writer by others, nor yet as proof that he actually went away from Wichita, but as evidence that, shortly before the time when other evidence tended to show that he went away, he had the intention of going, and of going with Hillmon, which made it more probable both that he did go and that he went with Hillmon than if there had been no proof of such intention.<sup>5</sup>

There are no Wisconsin cases which explicitly discuss the *Hillmon* doctrine within the context of Wis. Stats. § 908.03(3).<sup>6</sup> A similar inference is seen, however, in some cases where the

<sup>3</sup>McCormick on Evidence § 275 (7th ed.).

<sup>4</sup>*Mutual Life Ins. Co. of New York v. Hillmon*, 145 U.S. 285, 12 S. Ct. 909, 36 L. Ed. 706 (1892).

<sup>5</sup>*Mutual Life Ins. Co. of New York v. Hillmon*, 145 U.S. 285, 295–96, 12 S. Ct. 909, 36 L. Ed. 706 (1892).

<sup>6</sup>*Hillmon* has generated great interest among the commentators. See, e.g., Hinton, States of Mind and the Hearsay Rule, 1 U.Chi.L.Rev. 394 (1934); Hutchins and Slesinger, Some Observations on the Law of Evidence—

State of Mind to Prove an Act, 38 Yale L.J. 283 (1929); Maguire, The *Hillmon* Case—Thirty-Three Years After, 38 Harv. L. Rev. 709 (1925); McFarlane, Dead Men Tell Tales: Thirty Times Three Years of the Judicial Process, 30 Vill. L. Rev. 1 (1985); Payne, The *Hillmon* Case—An Old Problem Revisited, 41 Va. L. Rev. 1011 (1955); Rice, The State of Mind Exception to the Hearsay Rule: A Response to "Secondary Relevance," 14 Duquesne L. Rev. 219 (1976); Seidelson, The State of Mind Exception to the Hearsay Rule, 13 Duquesne L.Rev. 251 (1974);

hearsay rule is satisfied under a different exception. For example, in a murder prosecution, testimony that the defendant threatened to kill the victim several months prior to the shooting may be relevant to demonstrate the defendant's intent. The hearsay problem is obviated by the exception for personal admissions by a party opponent.<sup>7</sup> The prosecution generally uses the statement to prove motive and intent, both at the time the statement was made and at the time of the killing. The inference is that the state of mind manifested in the statement (motive and intent) continued until the date of the killing, and that the declarant/defendant acted on that mental impulse to kill.<sup>8</sup>

Where the statement is solely used to prove the declarant's own later conduct in conformity with the expressed design, plan or intent, the hearsay problems are minimal. More difficult problems are raised by the use of such statements to prove that the declarant did the act, and did it with a third person. This issue has arisen in homicide cases where the prosecution attempts to link the defendant to the crime through testimony that prior to the offense the victim indicated that she was going to meet the defendant at a later time.<sup>9</sup> The victim's statement of intent or

Seligman, An Exception to the Hearsay Rule, 26 Harv. L. Rev. 146 (1912).

<sup>7</sup>Wis. Stats. § 908.01(4)(a)1.

<sup>8</sup>See, e.g., *State v. Johnson*, 60 Wis. 2d 334, 341, 210 N.W.2d 735, 738 (1973):

As to the statements showing present intent by Harold, we conclude that the statements were erroneously excluded. In *Lager v. Department of Industry* [50 Wis. 2d 651, 185 N.W.2d 300 (1971)] we approved the admission of declarations of intent as proof that the intent was carried out. Although this was a civil case there is no mention that a different rule should be generally applied in criminal cases . . .

<sup>9</sup>*People v. Alcalde*, 24 Cal. 2d 177, 148 P.2d 627 (1944). The relevancy of the evidence must be carefully assessed. See *U.S. v. Persico*, 645 F.3d 85, 100-01 (2d Cir. 2011) (in a murder prosecution, the widow testified that her husband, the murder victim, told her that he was going to meet with the defendant at a specific location; held that the victim's statement was properly admitted to show his intent to meet the defendant at a

place certain: "The point we made in [U.S. v. Delvecchio, 816 F.2d 859, 22 Fed. R. Evid. Serv. 1605 (2d Cir. 1987)] was that, while a declarant's statement of intention to do something with another person is admissible as evidence that the declarant acted in accordance with his stated intention, it is not admissible under Rule 803(3) to show that the third person also acted in accordance with an intention attributed to him by the declarant. In contrast, Cutolo's statement in the present case was in no way offered to show that in fact "Persico met Cutolo at the Shore Road location"; rather, that statement was properly admitted to show Cutolo's intent to meet Persico there and to support an inference that Cutolo acted in furtherance of that intent, from which the jury could reasonably infer that Cutolo had communicated to Persico that Cutolo would be at Shore Road expecting to meet Persico there. Cutolo's statement that he was going to Brooklyn on the afternoon of May 26 to meet with Persico made it more probable that Cutolo went to Brooklyn with the expectation of meeting there with

plan to do something with a third person, when offered to prove that this in fact occurred, raises all of the dangers associated with hearsay. There is a risk that the declarant (the victim) may have misperceived or erroneously recollected the third person's intent, in addition to the problems of insincerity and narration which are already present. Nonetheless, courts have generally admitted such statements because the evidence is needed and its weaknesses are readily apparent.<sup>10</sup>

Despite these difficulties, it is generally accepted that the statement of the declarant's intent can be used to prove that the declarant did an act, and did it with the third person. Although the federal legislative history on this point is clouded, the federal decisional law supports the application of the *Hillmon* doctrine to the cooperative acts of third persons.<sup>11</sup>

#### § 908.03(4) STATEMENTS FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

\* \* \*

**(4) Statements for purposes of medical diagnosis or treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Persico, than if he had made no such statement. Under 803(3), the jury could draw the inference that Cutolo acted in furtherance of his stated intent to go meet Persico. From this evidence and other evidence that Persico and Cutolo habitually conducted their meetings under the Shore Road overpass where they would not be observed, together with the evidence that Cutolo went to that place that very afternoon—the jury could have inferred that Cutolo communicated to Persico (or to Persico's people) that Cutolo would be there expecting to meet Persico. Such an inference would fit with the theory advanced by the government that Persico, engaging in a Mafia practice of "luring" persons who were to be killed, had lured Cutolo to 92nd and Shore so that Persico could arrange for his murder. John Carillo, an investigator for the United

States Attorney's Office for the Southern District of New York, explained that the La Cosa Nostra common practice of "luring" was meant "to make somebody comfortable.") (citation omitted).

See McLain, "I'm Going to Dinner with Frank": Admissibility of Non-testimonial Statements of Intent to Prove the Actions of Someone Other Than the Speaker—And the Role of the Due Process Clause as to Non-Testimonial Hearsay, 32 CARDNOZI L. REV. 373 (2010) (reviewing the split of authority on this issue).

<sup>10</sup> McCormick on Evidence § 275 (7th ed.) ("Despite some rulings to the contrary, courts have generally admitted these statements.") (note omitted).

<sup>11</sup> Graham, Handbook of Federal Evidence § 803:3 (7th ed.) (most courts have "opted in favor of admissibility").

## AUTHOR'S COMMENTS

## § 803.4 Statements for purposes of medical diagnosis or treatment

## § 803.4 Statements for purposes of medical diagnosis or treatment

This rule creates a hearsay exception for statements made by the declarant for purposes of medical diagnosis or treatment. The statements may describe medical history, past or present symptoms, pain or sensations, or the inception or general character of the cause or external source of the medical complaint. The statements must, however, be reasonably pertinent to the medical diagnosis or treatment. The rule is a one-way street; it does not admit statements by a physician to the patient, although such statements may well be admissible under some other exception or to provide context for the patient's statements (nonhearsay).<sup>1</sup> The rule is substantively identical to Fed. R. Evid. 803(4).<sup>2</sup>

Although the rule on its face applies only to "medical" diagnosis or opinion, the courts have not limited it to diagnosis or treatment by physicians holding the "M.D." degree.<sup>3</sup> With little discussion, Wis. Stats. § 908.03(4) has been extended to psychologists, psychiatrists, and chiropractors.<sup>4</sup> The supreme court has drawn the line, however, at statements made to "counselors or social workers." The court distinguished health-care providers, whose primary concern is the individual's immediate physical and mental welling being, from those experts concerned with broader, more intractable social problems and whose intervention often

## [Section 803.4]

<sup>1</sup>See Giannelli, *Understanding Evidence* § 33.08 (4<sup>th</sup> ed.).

<sup>2</sup>As restyled for clarity in 2011, Fed. R. Evid. 803(4) states:

(4) **Statement Made for Medical Diagnosis or Treatment.** A statement that:

(A) is made for—and is reasonably pertinent to—medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

<sup>3</sup>This development is questionable on historical grounds though reasonable. Wis. Stats. § 908.03(4) arose out of the common law's experience with the hearsay basis for a physi-

cian's opinion. See McCormick on Evidence §§ 277, 278 (7th ed.).

<sup>4</sup>State v. Nelson, 138 Wis. 2d 418, 424, 406 N.W.2d 385, 387 (1987) (psychologist); State v. Wyss, 124 Wis. 2d 681, 707, 370 N.W.2d 745, 757 (1985) (disapproved of on other grounds by, State v. Poellinger, 153 Wis. 2d 493, 451 N.W.2d 752 (1990)) (psychiatrist); State v. Coogan, 154 Wis. 2d 387, 453 N.W.2d 186, 191 (Ct. App. 1990) (defendant argued that statements made by him while under hypnosis to prison psychiatrist were admissible under Wis. Stats. § 908.03(4); the court upheld the exclusion of the evidence on other grounds); Klingman v. Kruschke, 115 Wis. 2d 124, 126, 339 N.W.2d 603, 604 (Ct. App. 1983) (chiropractor).

See McCormick on Evidence § 277 (7th ed.).

involves efforts to determine “what happened” and to affix blame.<sup>5</sup>

Although the declarant will usually be the individual seeking diagnosis or treatment, the rule also permits statements by family members, for example, as where a mother tells the ER doctor how her young child was injured.<sup>6</sup> Nor is the rule confined to doctors. Statements made to admitting room nurses or ambulance attendants, for example, are within the exception.<sup>7</sup>

Wis. Stats. § 908.03(4) considerably broadened Wisconsin law by extending the common-law exception to statements made for purposes of diagnosis as well as medical treatment.<sup>8</sup> Put differently, the fact that an expert was consulted solely for the purpose

<sup>5</sup>State v. Huntington, 216 Wis. 2d 671, 278 ¶ 42, 575 N.W.2d 268 (1998) (prosecution of a stepfather for sexually assaulting a child under the age of 13 years; statements made by the victim to a tribal “therapist” who in turn related the information to a nurse practitioner did not fall within Wis. Stats. § 908.03(4): “We decline, however, to apply the hearsay exception for statements made for medical diagnosis or treatment, [Wis. Stats. § 908.03(4)], to statements made to counselors or social workers. Such an expansive application of the doctrine would strain the traditional grounds for the exception. Receipt of proper medical diagnosis and treatment requires doctors to obtain basic information about a patient implicating that diagnosis and treatment. The doctor is focused on diagnosis and treatment of the individual, ‘not on the process of providing larger social remedies aimed at detecting abuse, identifying and punishing abusers, and preventing further mistreatment, which involves skills and social intervention lying beyond the expertise of doctors.’”) (citation omitted). This passage from *Huntington* strongly suggests that the real limiting factor is not one of credentials, that is, a physician versus a social worker, but whether health care providers have adequate skills to conduct investigations and the declarant’s motives in making such statements. If a social worker is involved in the chain of medical care under the supervision of a physician or therapist, for example, the patient’s statements may

well fall within this rule despite *Huntington*. See Giannelli, *Understanding Evidence* § 33.08 (4th ed.).

See State v. Domke, 2011 WI 95, ¶¶ 44-45, 337 Wis. 2d 268, 805 N.W.2d 364 (2011) (held that criminal defense counsel was deficient in not knowing the *Huntington* case and its “well-settled interpretation” that “excludes statements made to counselors and social workers from the medical diagnosis and treatment hearsay exception”), **quoting the treatise**.

The jurisdictions are split over the admissibility of these types of statements in child sexual abuse prosecutions. See McCormick on Evidence § 278 (7th ed.).

<sup>6</sup>McCormick on Evidence § 277 (7th ed.).

<sup>7</sup>See State v. Huntington, 216 Wis. 2d 671, 575 N.W.2d 268, 277-78 (1998) (prosecution of a stepfather for sexually assaulting a child under the age of 13 years; mother’s statements to a nurse practitioner, relating what the child had told her, were admissible under Wis. Stats. § 908.03(4)). The court cautioned that such statements “must be accompanied with guarantees of trustworthiness.” 575 N.W.2d at 278, n.9.

See also Fed. R. Evid. 803(4) advisory committee’s note (“Under this exception the statement need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family might be included.”).

<sup>8</sup>Wis. Stats. § 908.03(4) Judicial

of giving testimony affects only the weight to be given the statement, not admissibility.<sup>9</sup> Thus, such statements frequently inform an expert's opinion testimony and perform double evidentiary duty at trial by serving as a basis for an expert opinion and as substantive proof.<sup>10</sup>

The primary guarantee of trustworthiness is the declarant's motive to provide accurate information for the purpose of medical diagnosis or treatment.<sup>11</sup> Although not explicitly stated in Wis. Stats. § 908.03(4), the supreme court requires some awareness by

Council Committee's Note ("This exception is generally consistent with recent Wisconsin cases [citations omitted]; however it is a major change in Wisconsin law in permitting a doctor to relate the patient's statements of past or present symptoms or history including statements of the character or external source of the cause insofar as reasonably pertinent to diagnosis or treatment. As indicated in the Federal Advisory Committee Note, this rule would permit a doctor who was consulted only for the purpose of his testimony to relate such statements whether made to him or others. It should be noted, however, that statements made to others must be qualified for admission under the multiple hearsay rule, Wis. Stats. § 908.05.") (citations omitted).

<sup>9</sup>Fed. R. Evid. 803(4) advisory committee's note:

Conventional doctrine has excluded from the hearsay exception, as not within its guarantee of truthfulness, statements to a physician consulted only for the purpose of enabling him to testify. While these statements were not admissible as substantive evidence, the expert was allowed to state the basis of this opinion, including statements of this kind. The distinction thus called for was one most unlikely to be made by juries. The rule accordingly rejects the limitation. This position is consistent with the provision of [Fed. R. Evid. 703] that the facts on which expert testimony is based need not be admissible in evidence if of a kind ordinarily relied upon by experts in the field.

<sup>10</sup>See Wis. Stats. § 908.03(4) Judicial Council Committee's Note, which explains why it was necessary to extend Wis. Stats. § 908.03(4) to statements made to a doctor retained only for purposes of testifying ("Consistency in the treatment of expert testimony under [Wis. Stats. § 907.03] requires this change. Wisconsin has already permitted the indirect reception of similar statements as the basis for an expert opinion, *Rivera v. Wollin*, 30 Wis. 2d 305, 140 N.W.2d 748 (1966) (it is admitted as nonhearsay because not offered to prove the truth of the statements) and acknowledges the propriety of a doctor basing his medical opinion on the reports of others. In *Roberts v. State*, 41 Wis. 2d 537, 164 N.W.2d 525 (1969) (abrogated on other grounds by, *Loveday v. State*, 74 Wis. 2d 503, 247 N.W.2d 116 (1976) and *Vinicky v. Midland Mut. Cas. Ins. Co.*, 35 Wis. 2d 246, 151 N.W.2d 77 (1967)) approval was expressed of a medical expert's reliance upon a type of data reasonably relied upon by experts in the particular field although hearsay and commented favorably upon McCormick's view which supports the rule. The approval expressed in those cases, however, did not extend so far as to permit a medical diagnosis to be received in evidence through hospital records admitted under the "Regularly Conducted Activity" exception, sub (6), *Gibson v. State*, 55 Wis. 2d 110, 197 N.W.2d 813 (1972), nor does this exception go that far.").

<sup>11</sup>Fed. R. Evid. 803(4) advisory committee's note. McCormick on Evidence § 277 (6th ed.).

the declarant of the medical purpose of the information.<sup>12</sup> The demands are modest. Talking with a doctor, for example, will normally suffice. The desire to receive effective treatment or obtain an accurate diagnosis, together with the requirement that the statements relate to information that is reasonably pertinent to the diagnosis or treatment, endow the evidence with sufficient reliability to justify admission.<sup>13</sup>

The rule expressly permits some latitude regarding statements which relate how the condition occurred, provided the cause of the affliction is reasonably pertinent to the diagnosis or treatment.<sup>14</sup> Generally, statements affixing fault do not meet this requirement. In civil litigation, the doctor may need to know that the plaintiff sustained injuries in a car accident, yet the diagnosis or treatment will not hinge on which party had the right-of-way. Whether the plaintiff was wearing a seat restraint may, however, be pertinent in assessing the injuries (e.g., abrasions to the waist).<sup>15</sup> In addressing the “reasonably pertinent” requirement, it is suggested that the courts apply the reasonable reliance standard that governs the permissible bases for expert opinions under Wis. Stats. § 907.03.<sup>16</sup>

Within the context of a child sexual abuse prosecution, the

<sup>12</sup>State v. Nelson, 138 Wis. 2d 418, 431–32, 406 N.W.2d 385, 391 (1987).

<sup>13</sup>State v. Nelson, 138 Wis. 2d 418, 435, 406 N.W.2d 385, 391 (1987) (“It is well recognized that statements made for the purposes of medical diagnosis or treatment are admissible because the patient’s strong motivation to have improved health guarantees the statements’ trustworthiness. Although the absence of this strong motivation for trustworthiness (where the doctor is consulted solely for the purpose of testimony) may necessitate separate or additional evidence of trustworthiness, we hold that statements made for the purposes of medical diagnosis or treatment are sufficiently reliable to be admissible without any additional indicia of trustworthiness.”). *Nelson* addressed the Sixth Amendment confrontation right applying doctrine (“indicia of trustworthiness”) that was superseded by the *Crawford* rule in 2004. Its reference to “additional” guarantees of trustworthiness should be ignored.

<sup>14</sup>State v. Wyss, 124 Wis. 2d 681, 709, 370 N.W.2d 745, 758 (1985) (disap-

proved of on other grounds by, *State v. Poellinger*, 153 Wis. 2d 493, 451 N.W.2d 752 (1990)).

<sup>15</sup>Fed. R. Evid. 803(4) advisory committee’s note (citations omitted) (“[The rule] extends to statements as to causation, reasonably pertinent to the same purposes [of diagnosis or treatment], in accord with the current trend. Statements as to fault would not ordinarily qualify under this latter language. Thus a patient’s statement that he was struck by an automobile would qualify but not his statement that the car was driven through a red light.”), cited with approval in *State v. Nelson*, 138 Wis. 2d 418, 433, 406 N.W.2d 385, 392 (1987).

*McCormick on Evidence* § 278 (7th ed.).

<sup>16</sup>This approach is particularly apt because the driving force behind the expansion of Rule 803(4) to include statements for treatment or diagnosis was the hollowness of any distinction between using such statements as substantive evidence or as a basis for the expert’s opinion. See *McCormick on Evidence* § 278 (7th ed.).

court has permitted statements by a child indicating that her father had sexually abused her.<sup>17</sup> The court reasoned that the therapeutic and diagnostic complexities of intrafamily sexual abuse cases justified this interpretation.<sup>18</sup> Regardless of whether such hearsay falls within § 908.03(4), the criminal defendant's right of confrontation will provide additional, extraordinary barriers to admissibility.<sup>19</sup>

### § 908.03(5) RECORDED RECOLLECTION

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

\* \* \*

**(5) Recorded recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made when the matter was fresh in his memory and to reflect that knowledge correctly.

### AUTHOR'S COMMENTS

#### § 803.5 Recorded recollection

#### § 803.5 Recorded recollection

The law of evidence has long recognized an exception for records of past recollection. Wis. Stats. § 908.03(5) is consistent with earlier Wisconsin case law.<sup>1</sup> The rule extends to any memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him or her to testify fully and accurately. The record or

<sup>17</sup>See *State v. Sorenson*, 143 Wis. 2d 226, 421 N.W.2d 77, 87 (1988).

<sup>18</sup>*State v. Nelson*, 138 Wis. 2d 418, 433, 406 N.W.2d 385, 391 (1987) [citations omitted] ("[W]hile treatment of a physical injury would rarely require disclosure of the identity of the assailant, it is recognized that disclosure of the identity of the assailant is reasonably necessary to provide treatment for a victim of child abuse. Child abuse cases often involve emotional and psychological injuries as well as a physical injury. Treatment of these emotional and psychological injuries of a child abuse victim often depends upon the identity of the abuser.").

For a thorough analysis and critique of Nelson, see Tuerkheimer,

Convictions Through Hearsay in Child Sexual Abuse Cases: A Logical Progression Back To Square One, 72 Marq. L. Rev. 47 (1988).

<sup>19</sup>Section 802.3 discusses the doctrinal upheaval in the wake of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177, 63 Fed. R. Evid. Serv. 1077 (2004). Most such statements will constitute testimonial hearsay and thus be inadmissible unless the declarant (the child) testifies at trial or the other *Crawford* conditions are met.

[Section 803.5]

<sup>1</sup>Wis. Stats. § 908.03(5) Judicial Council Committee's Note.

memorandum must be shown to have been made when the matter was fresh in the witness' memory and to reflect the knowledge correctly. The rule differs in several respects from the corresponding federal rule, as discussed below.<sup>2</sup>

At the outset one should observe that this rule requires that the declarant testify as a witness. Logically, the past recollection recorded exception should have been grouped with prior statements by witnesses under § 908.01(4), but Wisconsin followed the lead of the federal rules, which miscast this exception among those where the declarant's availability is (otherwise) "immaterial."

Past recollection recorded must be distinguished from present recollection refreshed. Wis. Stats. § 906.12 governs the practice of refreshing witnesses' memories so that they can testify about their firsthand observations.<sup>3</sup> If the witness made notes shortly after the event, they may be used to refresh her memory before trial or even while testifying. Sometimes this is accomplished by showing witnesses documents they did not prepare or perhaps have never seen before (e.g., a police report summarizing the witness's oral statements).<sup>4</sup> The key to refreshed recollection is that the witness claims to now remember a past event, an assertion that can be tested by an opponent. Past recollection recorded, however, is a hearsay exception that requires more by way of foundation; it effectively substitutes a record for the witness's failed memory.<sup>5</sup> Frequently the two rules are used in tandem. Upon an unsuccessful attempt to refresh the witness's memory,

<sup>2</sup>Fed. R. Evid. 803(5) provides:

(5) **Recorded Recollection.** A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

<sup>3</sup>State v. Wind, 60 Wis. 2d 267, 274–75, 208 N.W.2d 357, 362, 75 A.L.R.3d 709 (1973) ("If a witness can look at a writing which refreshes his memory as to the facts and he can then testify from his independent rec-

ollection, his testimony and not the writing is admitted in evidence, as present recollection refreshed. On the other hand, if a witness looks at a writing and it does not refresh his memory to the extent that he can form an independent recollection but he can testify that he knew the facts to be accurate when he recorded them and such recording took place when the facts were fresh in his mind, then under the doctrine of past recollection recorded, the document itself is admitted into evidence as an exception to the hearsay rule.").

<sup>4</sup>See § 612.1.

<sup>5</sup>See, e.g., *State ex rel. Huser v. Rasmussen*, 84 Wis. 2d 600, 609, 267 N.W.2d 285, 290 (1978) ("The chemists did not testify that examination of their reports gave them a refreshed and independent recall of the facts to which they testified. Their testimony

the proponent changes tack and pursues the foundation required by Wis. Stats. § 908.03(5).

Typically, the memorandum or record will be a writing but the rule's language extends to electronically-stored records as well. Nonetheless, there must be a tangible exhibit; oral statements are not "memorandums or records" within the meaning of Wis. Stats. § 908.03(5).<sup>6</sup> Examples of statements covered under the rule include hospital records, transcripts of testimony, police reports, and written statements of witnesses.<sup>7</sup> Experts witnesses receive special dispensation of sorts, as Wis. Stats. § 907.07 permits them to read from their reports to the extent admissible. (See § 702.6.)

The rule also requires that the hearsay declarant testify as a witness in the litigation. The proponent must establish that the witness had personal knowledge of the facts recited in the memorandum or record and now cannot clearly recall them.<sup>8</sup> Put differently, the witness must remember what she forgot, an obvious problem counterbalanced by the need for the evidence and the opponent's ability to test her memory in court. Wis. Stats. § 908.03(5) does not require a total failure of the witness's memory. A witness's concession that he has an insufficient recollection to testify "fully and accurately" about the subject matter will suffice.<sup>9</sup> (Unsuccessful attempts at present recollection refreshed are clearly adequate.) This element should be liberally

on cross-examination established that none of the chemists had such a refreshed recollection. The trial court erred, therefore, in admitting their oral testimony as to the tests performed and the results of those tests. Because the chemists had no independent recollection of performing the tests or observing the results indicated in their reports, the documents themselves, instead of the witnesses' testimony, are all that should have been admitted as evidence of these facts.").

<sup>6</sup>See *State v. Jenkins*, 168 Wis. 2d 175, 483 N.W.2d 262, 267 (Ct. App. 1992) (defendant convicted of first-degree murder; a three-year-old child who witnessed his mother's death was interviewed by a prosecutor; by the time of trial the child was seven years old and remembered little of relevance, so the prosecutor testified to the child's earlier statements based on notes by police; held that Wis. Stats. § 908.03(5) required that "the recorded recollec-

tion must exist in some physical form; testimony by someone to whom the declarant made the statement is not sufficient."). The State obviously could not show a foundation for a cooperative report, see below, which would have required the child (age seven) to testify that he confirmed the accuracy of the notes at age 3.

<sup>7</sup>See McCormick on Evidence § 281 (7th ed.).

<sup>8</sup>McCormick on Evidence § 282 (7th ed.).

<sup>9</sup>*State v. Keith*, 216 Wis. 2d 61, 573 N.W.2d 888, 895 (Ct. App. 1997) (in ch. 980, Stats., sexual predator commitment hearing, harmless error occurred when the court admitted a police report relied upon by a police officer/witness who used the report to successfully refresh his memory; the report thus failed to qualify under Wis. Stats. § 908.03(5) because the witness was able to testify fully and accurately from his own memory).

construed because of the procedural safeguards built into the rule. Since the witness who made the statement is in court, under oath, and subject to cross-examination concerning the statement, the hearsay dangers are minimal at best. Conversely, some memory impairment is required in order to forestall the wholesale introduction of carefully prepared prior written statements which serve as little more than scripts.<sup>10</sup> In any event, the trial court has the discretionary authority to exclude probative evidence that is substantially outweighed by dangers of unfair prejudice under § 904.03.

Finally, the proponent must demonstrate that the record accurately reflected the witness's personal knowledge when it was made. The problem, of course, is that by definition the witness no longer "fully" recalls the matter. The key factor is the accuracy of the information; the rule imposes no rigid limit on the elapsed time between the event and the making of the document.<sup>11</sup> In the simplest case imaginable, the witness identifies the writing as one she personally prepared shortly after the event, while things were still very fresh in her mind. Yet the case law permits far greater latitude than this in showing the accuracy of the information. McCormick states:

[I]f present memory is inadequate, the requirement may be met by testimony that the declarant knows it is correct because of a habit or practice to record such matters accurately or to check them for accuracy. At the extreme, some courts find sufficient testimony that the individual recognizes his or her signature and believes the statement correct because the witness would not have signed it if

<sup>10</sup>McCormick on Evidence § 282 (7th ed.). ("Clouded by the passage of time, present recollection is often less accurate than a statement made at or near the time when recollection was fresh and clear. However, completely eliminating the requirement that the witness must have some memory impairment would likely encourage the use of statements carefully prepared for litigation under the supervision of claims adjusters or attorneys or under other circumstances casting significant doubt upon the reliability of the statement.").

There has been significant support for abolishing the lack of memory requirement altogether, but it was feared that this might open the door to "canned" statements prepared by professionals for the witness for pur-

poses of litigation. See Fed. R. Evid. 803(5) advisory committee's note.

<sup>11</sup>McCormick on Evidence § 281 (7th ed.) ("However, the trend is toward accepting the formulation favored by Wigmore which would require only that the writing be made or recognized at a time when the events were fairly fresh in the mind of the witness. The formula of Federal Rule 803(5) is 'when the matter was fresh in his [the witness'] memory.'") (note omitted).

U.S. v. Green, 258 F.3d 683, 689, 56 Fed. R. Evid. Serv. 906 (7th Cir. 2001) (holding that an 11-day lapse between an interview and the making of a written summary did not, "in-and-of-itself—make the interview so remote that Jefferson [the report writer] could not have accurately recalled it").

he or she had not believed it true at the time.<sup>12</sup>

The rule is similarly generous with respect to what constitutes the "making" of a record. Again, the simplest examples are a handwritten note scribbled on an envelope, a text message, or perhaps even an electronically recorded note prepared by the witness.<sup>13</sup> The exception also reaches records prepared by more than one person. "Cooperative reports" are records prepared with the assistance of another person and later reviewed for accuracy by the witness. Dictated memorandums by an observer that are typed by a personal assistant and later verified for accuracy are familiar illustrations. In such cases the rule requires only the testimony of the person who verified the record for accuracy, provided the other elements of the exception are satisfied.

A second form of "cooperative reports" involves multiple declarants who collectively contribute to a document that is not specifically verified by the declarant who has personal knowledge.<sup>14</sup> The foundation may be likened to a chain-of-custody where the proponent establishes that certain information was transferred from person to person until it was ultimately recorded by the last person in the chain. And, like a chain-of-custody, the record's trustworthiness depends upon a demonstration that the "thing" was not substantively altered in the process of transfer. For example, assume A observes an event that he then orally relates to B, who writes the statement into a report. If A can no longer recall exactly what he saw, he may be permitted to testify that he accurately related his observations to B, whatever they may have been. The proponent should then offer testimony by B that he accurately recorded the statement, whatever it was, uttered by A.<sup>15</sup> (Note that this foundation entails testimony by both declarants A and B.) In short, the proponent is using the past

<sup>12</sup>McCormick on Evidence § 283 (7<sup>th</sup> ed.).

<sup>13</sup>See, e.g., *State ex rel. Huser v. Rasmussen*, 84 Wis. 2d 600, 607, 267 N.W.2d 285, 289 (1978) (Wis. Stats. § 908.03(5) was satisfied where "the record shows that on cross-examination, defense counsel elicited the testimony of chemist David. R. Picard that he did not recall running the particular tests in question; that his report was true and accurate; and that he wrote down his test results as he did them").

<sup>14</sup>The original version of Fed. R. Evid. 803(5), as submitted to Congress

by the Supreme Court, was identical to the Wis. Stats. § 908.03(5). Congress amended the federal rule to require that the record must be shown to "have been made or adopted by the witness." With regard to the Supreme Court's version, the federal advisory committee's note to Rule 803(5) stated: "Multiple person involvement in the process of observing and recording, as in *Rathbun v. Brancatella*, 93 N.J.L. 222, 107 A. 279 (N.J. Ct. Err. & App. 1919), is entirely consistent with the exception."

<sup>15</sup>McCormick on Evidence § 283 (7<sup>th</sup> ed.).

recollection recorded exception to reach both levels of hearsay.<sup>16</sup>

The Wisconsin rule differs in wording from Fed. R. Evid. 803(5), which refers to records "made or adopted by" the witness; § 908.03(5) states only that the declarant must have "made" the statement. The discrepancy has not resulted in any significantly different interpretations of the rules.<sup>17</sup> Both versions embrace the cooperative and multi-party reports described above.

A second difference between the Wisconsin version of this exception and Fed. R. Evid. 803(5) involves the method of admitting evidence under this exception. Under the Wisconsin rule the record itself may be admitted into evidence. Under Fed. R. Evid. 803(5), however, the content of the record or memorandum may be read to the jury but the record itself may not be received as an exhibit unless offered by the adverse party. The concern was that a jury might place more value on documentary evidence than testimony. It should be observed that under the Wisconsin rule, the judge retains the discretion to decide when and how the exhibit should be published to the jury, and whether the exhibit (or any other) should be sent to the jury during deliberations.<sup>18</sup>

### § 908.03(6) RECORDS OF REGULARLY CONDUCTED ACTIVITY

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

\* \* \*

**(6) Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with

<sup>16</sup>See *State v. Kreuser*, 91 Wis. 2d 242, 280 N.W.2d 270, 273 (1979) (per curiam). In that case, the court cited and discussed *Rathbun v. Brancatella*, 93 N.J.L. 222, 107 A. 279 (N.J. Ct. Err. & App. 1919), which was cited by the federal advisory committee as authority for the multiple-person application of past recollection recorded. The court in *Kreuser* asserted that it reached the same "conclusion" as the *Rathbun* case, but the reasoning was very different. Rather than analyzing all of the different layers of hearsay under this one exception, the *Kreuser* court resorted to several other exceptions and did not examine past recollection recorded. Interestingly, the recent editions of McCormick cite *Kreuser* along with *Rathbun* in discussing multi-

person past recollection recorded. McCormick on Evidence § 283 (7th ed.).

<sup>17</sup>McCormick on Evidence § 283 (7th ed.) (discussing Congress's "inartful drafting").

<sup>18</sup>Wis. Stats. § 908.03(5) Judicial Council Committee's Note ("The federal rule provision that the memorandum may be read into evidence by proponent's witness but may not be received as an exhibit unless offered by an adverse party has been deleted. Ample protection from undue emphasis upon the statement is found in the discretionary authority of the trial judge to keep exhibits from the jury room."). See also § 611.4.

knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, or by certification that complies with s. 909.02(12) or (13), or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness.

#### AUTHOR'S COMMENTS

§ 803.601 Records of regularly conducted activity generally

§ 803.602 Third-party records

§ 803.603 Foundations: Certificates and witnesses

#### § 803.601 Records of regularly conducted activity generally

Since the early nineteenth century, the law of evidence has carved an ever broadening hearsay exception for records of regularly conducted activities. At its inception the rule was a relatively narrow "shop book" rule that evolved into the broader "business records" provision by the early twentieth century.<sup>1</sup> Reliability and convenience fueled the rule's expansion. Reliability stemmed from the recording of recurring, relatively routine events by employees paid to keep track of them. Convenience inhered in the impracticality of requiring the proponent to produce all such employees, a burden unlikely to produce more accurate information than the record itself.

The foundational elements for records proffered under Wis. Stats. § 908.03(6), as well as the procedure set forth in subsection (6m) for health care provider records, are preliminary questions of fact for the trial court to decide by a preponderance of the evidence. The proponent of the evidence bears the burden of proof.<sup>2</sup> The Wisconsin rule differs from the original draft of Fed. R. Evid. 803(6), which has been changed further over the years. Most notably, the rule was revised for style in 2011; in 2014, Rule 803(6) was amended to clarify that the burden of establishing the untrustworthiness of a record rests with the opponent. The current version appears in the margin.<sup>3</sup>

Although commonly called the "business records" exception,

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<sup>1</sup>For the development of this exception, see *Radtke v. Taylor*, 105 Or. 559, 210 P. 863, 27 A.L.R. 1423 (1922); *McCormick on Evidence* § 285 (7th ed.).

<sup>2</sup>*Reiman Associates, Inc. v. R/A Advertising, Inc.*, 102 Wis. 2d 305, 318, 306 N.W.2d 292, 299 (Ct. App. 1981).

<sup>3</sup>Fed. R. Evid. 803(6):

**Records of a Regularly Conducted Activity.** A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;

(B) the record was kept in the

this is somewhat misleading because the rule extends without limitation to the records of any “regularly conducted activity.”<sup>4</sup> This may include, for example, the records of a corporation, a sole proprietorship, a police department, a charitable organization, or a town.<sup>5</sup> The current federal rule, Fed. R. Evid. 803(6)(B), also applies broadly to the records of “a business, organization, occupation, or calling, whether or not for profit[.]” Just because a business entity prepared a document does not mean that § 908.03(6) is inexorably implicated much less the only avenue of admissibility. Commercial paper, for example, may be independently admissible as a verbal act regardless of the regularly conducted activities exception.<sup>6</sup> And records of a party opponent are admissible as admissions regardless of § 908.03(6).

The rule embraces “records” that take “any form,” including memoranda, reports, records, or data compilations.<sup>7</sup> Computer generated records are expressly within the rule, regardless of

course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

<sup>4</sup>State v. Doss, 2008 WI 93, ¶ 44, n.6, 312 Wis. 2d 570, 754 N.W.2d 150 (2008) (observing that the exception for records of regularly conducted activities extends beyond just “business records” (quoting the treatise).

<sup>5</sup>Wis. Stats. § 908.03(6) Judicial Council Committee’s Note:

(1) Substituting “regularly conducted activity” for “business” eliminates the inherent restrictions in the application of the exception if a business connotation, no matter how broadly defined, is used. Although the original shop book statute is used in [Wis. Stats. § 889.25], use of the term “business” tends to restrict the application of the statute. A police report of an accident investigation is a record of a regularly conducted

activity. This alters the decision in *Wilder v. Classified Risk Ins. Co.*, 47 Wis. 2d 286, 177 N.W.2d 109, 112 (1970) that such a report is not a business record; however, as appears by item (3) *infra*, the exclusion of the report from evidence remains unchanged.

See McCormick on Evidence § 288 (7th ed.) (providing a broad range of examples).

<sup>6</sup>Dow Family, LLC v. PHH Mortg. Corp., 2013 WI App 114, ¶¶ 20-23, 350 Wis. 2d 411, 838 N.W.2d 119 (Ct. App. 2013), aff’d, 2014 WI 56, 354 Wis. 2d 796, 848 N.W.2d 728, 84 U.C.C. Rep. Serv. 2d 87 (2014) (in a mortgage foreclosure action, held that the note establishing the debt was a “legal act” and not hearsay, thus, the proponent did not have to prove that the note fell within a hearsay exception, such as § 908.03(6); nonetheless, it was error to admit a copy of the note, rather than the original, because the proponent failed to properly authenticate the copy as a “true and correct copy of the original,” thus failing to establish a *prima facie* case that the note was admissible).

<sup>7</sup>Fed. R. Evid. 803(6) advisory committee’s note (“The form which the ‘record’ may assume under the rule is described broadly as a ‘memorandum, report, record, or data compilation, in any form.’ The expression ‘data compilation’ is used as broadly descriptive of

whether they exist in electronic form (stored by computer software on a harddrive or in a "cloud") or as "hardcopy."<sup>8</sup>

The record may reflect an act, event, condition, opinion, or diagnosis. The only meaningful restriction on the matter recorded is the nature of the record-keeping enterprise. (Why would the chess club track the weather?) The inclusion of opinions and diagnoses went far beyond the common law.<sup>9</sup> The term "diagnosis" applies to medical and psychological evidence while "opinion" may refer to any subject matter and include even "summaries" of information.<sup>10</sup> The admissibility of the opinions may also be as-

any means of storing information other than the conventional words and figures in written or documentary form. It includes, but is by no means limited to, electronic computer storage. The term is borrowed from revised Rule 34(a) of the Rules of Civil Procedure.").

<sup>8</sup>For computer records, see McCormick on Evidence § 294 (7th ed.) (discussing the additional foundation that may be necessary). An excellent discussion of the foundation for computer records is O'Shea, "Thinking Outside the 'Business Records' Box: Evidentiary Foundations for Computer Records," 81 *Wisconsin Lawyer* 8 (February 2008). See U-Haul Intern., Inc. v. Lumbermens Mut. Cas. Co., 576 F.3d 1040, 1044–45, 80 Fed. R. Evid. Serv. 426 (9th Cir. 2009), for additional opinion, see, 348 Fed. Appx. 208 (9th Cir. 2009) (insurance dispute among insured, primary insurer and excess insurer; computerized records of payments were properly admissible because the foundation under Fed. R. Evid. 803(6) had been established; the court rejected a wide range of objections).

<sup>9</sup>Wis. Stats. § 908.03(6) Judicial Council Committee's Note (citation omitted):

(2) Opinions and diagnoses are specifically admissible. The exclusion of an out-of-court statement because it embraces an opinion is not in keeping with a modern view of the opinion rule. In addition, [Wis. Stats. § 907.01] makes clear that a lay opinion is admissible if rationally based upon the perception of the witness. [Wis. Stats. § 907.03] makes clear that the diagno-

ses need not be based upon admissible evidence if of a type reasonably relied upon by experts in the particular field. Note also that in *Lewandowski v. Preferred Risk Mut. Ins. Co.*, 33 Wis. 2d 69, 77, 146 N.W.2d 505, 509 (1966) a hearsay medical opinion upon which a medical witness relied was evidence for impeachment purposes. However, this subdivision goes further than the application of the foregoing principles . . . and expressly permits opinions and diagnoses, but special note should be taken of the limits of admissibility upon all data including opinions and diagnoses . . . This change will resolve in favor of admissibility the question of whether a medical opinion in a hospital record is admissible in direct proof of the fact unless excluded because of confrontation problems.

<sup>10</sup>Town of Fifield v. State Farm Mut. Auto. Ins. Co., 120 Wis. 2d 227, 229, 353 N.W.2d 788, 789 (1984) ("We conclude that such summaries of invoices received by the town clerk in the course of the clerk's usual function of receiving and recording charges made against the town could appropriately be used by [the witness to support his testimony about the expenses incurred by the town for a damaged bridge]. The summaries of information prepared by the clerk from invoices received in the course of business of the town clerk's office were admissible as exceptions to the hearsay rule.") (citation omitted).

Rennick v. Fruehauf Corp., 82 Wis. 2d 793, 807, 264 N.W.2d 264, 271 (1978) (rejecting claim that trial court erred by permitting the plaintiff's attending physician to read from the

sessed in light of the evidentiary rules governing lay or expert opinion testimony, although there is no requirement that the record itself comply with the foundational intricacies governing expert opinions, § 907.02.<sup>11</sup> The trial court has the discretion to exclude opinions or diagnoses if the evidence demands an explanation, or where the "source of information" points to a lack of "trustworthiness" under § 908.03(6).<sup>12</sup>

Regardless of the subject matter, the entry must have been made at or near the time of the matter recorded. The key is whether the time span creates a significant danger of distortion or inaccuracy, yet a lengthy or unexplained delay also suggests a troubling lack of regularity.<sup>13</sup> The permissible length of elapsed time will depend upon the nature of the underlying activity, the record keeping procedures, and the facts of the case.

Lay declarants who participated in the report's creation must have firsthand knowledge, as required by Wis. Stats. § 906.02. The rule explicitly requires that the entry must have been made by one with "knowledge," or from information transmitted by a person with personal knowledge of the event or activity. Thus, the report's author need not have been the one who actually witnessed the event. Indeed many business records consist of multiple layers of hearsay that essentially relay the "word" of the first declarant in the chain. The utility of Wis. Stats. § 908.03(6) is that multiple layers of hearsay may all be covered by this

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report of consulting neurologist: "the Judicial Committee's notes to [Wis. Stats. § 908.03(6)], pertaining to the hearsay exception for records of regularly conducted activity, suggest allowance of medical opinions and diagnoses from hospital records in direct proof. Likewise, the medical opinions and diagnoses contained in the report of a consulting specialist, used by the testifying medical expert in making his diagnosis has sufficient trustworthiness to permit admission in direct proof".

Kuhlman, Inc. v. G. Heileman Brewing Co., Inc., 83 Wis. 2d 749, 760, 266 N.W.2d 382, 387 (1978) (interoffice memorandum expressing opinions); Rollie Johnson Plumbing & Heating Service, Inc. v. State Dept. of Transp. (Division of Highways), 70 Wis. 2d 787, 792, 235 N.W.2d 528, 531 (1975) (real estate appraisal was an "opinion" within the rule).

<sup>11</sup>See Wis. Stats. § 908.03(6) Judicial Council Committee's Note (quoted above).

<sup>12</sup>See *Pophal v. Siverhus*, 168 Wis. 2d 533, 484 N.W.2d 555, 560 (Ct. App. 1992) (held that the trial judge properly excluded opinions or diagnoses by three treating physicians, none of whom testified, regarding the onset of plaintiff's cerebral palsy; all of the opinions qualified under Wis. Stats. § 908.03(6), but the court held that the hearsay may still be excluded if it "requires explanation or a detailed statement of the judgmental factors upon which the diagnosis or opinion is based.") (citation omitted). Such rulings should be extraordinary; opponents should not be permitted to subvert § 908.03(6) by the expedient of objecting on grounds that an opinion in a record is not supported or explained on the record's face. See Judicial Council Committee's Note, quoted above.

<sup>13</sup>McCormick on Evidence § 289 (7th ed.).

single exception.<sup>14</sup> Each layer must conform to the rule's foundational requirements.

Regardless of the number of declarants involved in the making of the entry, *all* of them must have been part of the organization that prepared the record to fall within the rule.<sup>15</sup> For example, assume that Officer Y writes a police report that states the following:

On today's date I spoke with Officer X, who informed me that he arrived at the scene of the fire and observed smoke billowing from a broken rear basement window. Officer X also informed me that he spoke with Citizen A, who told him that shortly before the fire she saw several youths in the backyard near the same broken window carrying red gasoline containers.

In this example, Officers Y (the report's author) and Officer X are part of the police organization that prepared the report and thus are under an obligation to correctly observe such matters and accurately report them. The report may be admissible to prove the truth of what Officer X told Officer Y about his own firsthand observation; namely, that he saw smoke billowing from the broken basement window—two layers of hearsay (Y's written report and X's oral statement).<sup>16</sup> Citizen A's statements, as recounted in the report, involve three layers of hearsay—(1) A's oral statement to X, (2) X's oral statement to Y relating what A said, and (3) Y's report. Since she was not a police officer, Citizen A was under no organizational duty to accurately describe what she saw. Although Citizen A may have a moral duty to speak the truth and could be punished criminally for lying or misleading the officers, she is not part of the police organization and her statements fall outside of the exception for records of regularly conducted activities.<sup>17</sup> The proponent must find another rule that covers A's statement (e.g., excited utterance).

<sup>14</sup> See § 805.1.

<sup>15</sup> See *Wilder v. Classified Risk Ins. Co.*, 47 Wis. 2d 286, 293, 177 N.W.2d 109, 114 (1970); *State v. Gilles*, 173 Wis. 2d 101, 496 N.W.2d 133 (Ct. App. 1992) (discussed below).

<sup>16</sup> See *Wilder v. Classified Risk Ins. Co.*, 47 Wis. 2d 286, 289, 177 N.W.2d 109, 114 (1970) (discussing inadmissibility of traffic accident reports).

<sup>17</sup> *Mitchell v. State*, 84 Wis. 2d 325, 330, 267 N.W.2d 349, 352 (1978) (harmless error at a preliminary examination when the judge admitted a police report which contained statements by a citizen asserting his owner-

ship of the car involved and his non-consent as to the defendant's use of it: "In admitting these reports into evidence at the preliminary examination, the court relied on [Wis. Stats. § 908.03(6)], the so-called business records exception. This exception allows the introduction of documents made in the course of a regularly conducted activity, which includes police reports. When the report contains out-of-court assertions by others, an additional level of hearsay is contained in the report and an exception for that hearsay must also be found. [Wis. Stats. § 908.05]. That is, the reports cannot establish more than their subject matter. Thus, defendant's hearsay objec-

The preceding analysis follows from the rule's requirement that the entry must have been made at or near the time it occurred by, or from information transmitted by, a person with knowledge, "*all in the course of a regularly conducted activity*" (emphasis added).<sup>18</sup> In short, all declarants must have been members of the entity and obligated to accurately record and transmit the information; furthermore, all entries culminating in the final record must have been made within the confines of the organization.<sup>19</sup> Only in this way can one rely on the inference

tion is not to the details of which the officer had personal knowledge but to the repetition of declarations made by Hurst [the owner] to the officer over the phone. The business records exception does not allow admission of this second level of hearsay.").

<sup>18</sup>Wis. Stats. § 908.03(6) Judicial Council Committee's Note (citation omitted):

(3) This exception requires that the information be transmitted from a person with personal knowledge to the person making the entry in the course of a regularly conducted activity. Restated, it means that the entry must be based upon information transmitted to the recorder by one with (a) first-hand knowledge, and (b) a responsibility to know and report the information. Assume the situation in [Wilder v. Classified Risk Ins. Co., 47 Wis. 2d 286, 177 N.W.2d 109 (1970)], where the police report incorporated an eyewitness statement. In the first instance it would be admissible to prove that the witness made the statement if the witness had testified and the truth of his testimony were at issue, but in the absence of the witness' testimony would not be admissible to prove what the witness said. The problem, is, of course, one of double hearsay [Wis. Stats. § 908.05] described in Smith v. Rural Mut. Ins. Co., 20 Wis. 2d 592, 601, 123 N.W.2d 496, 502 (1963) as an exclusion of statements in a report to which the maker could not testify if he were upon the witness stand. The wording of this section requires personal knowledge transmitted in the course of a "business" duty. Thus, the rules of *Smith* and *Wilder* with regard to [Wis. Stats. § 889.25] would remain unchanged and the results of both cases would remain unchanged because

the information received by the officer from the witness was not transmitted by the witness in the course of a regularly conducted activity. On the other hand, the specific acknowledgment in the rule of the admissibility of opinions and diagnoses and the application of [Wis. Stats. § 907.01] and [Wis. Stats. § 907.03] will expand the application of this subdivision. Because most medical opinions and diagnoses will meet the requirements of personal knowledge and transmittal pursuant to a regularly conducted activity, they will usually be admissible. The use of the phrase "regularly conducted activity" will also expand the application of the section.

<sup>19</sup>State v. Gilles, 173 Wis. 2d 101, 496 N.W.2d 133 (Ct. App. 1992) (state crime lab analyst's statement to detective during a telephone conference, recorded in a police memorandum, did not fall within the business records exception covering the memorandum; "[Wis. Stats. § 908.03(6)] requires, however, that all of the declarants involved in the making of the memorandum be part of the organization which prepared it. If one of the declarants is not part of the organization, an additional level of hearsay is presented which must fall within some other exception.") (citation omitted) (citing the treatise).

See Kuhlman, Inc. v. G. Heileman Brewing Co., Inc., 83 Wis. 2d 749, 760-61, 266 N.W.2d 382, 387 (1978); Berg-Zimmer & Associates, Inc. v. Central Mfg. Corp., 148 Wis. 2d 341, n.6, 434 N.W.2d 834 (Ct. App. 1988) ("the Judicial Council Committee's Note—1974 states that the entry must be based on information transmitted to the recorder by one with first-hand

that the regularity of the record keeping provides sufficient guarantees of trustworthiness to warrant admissibility.

There must be some indication that the record of the event is one that is "regularly" prepared. The regularity of the *record* should not be confused with the frequency with which the *event* occurs. The key is whether an employee has an obligation or "business duty" to observe and to report the matters described in the record, regardless of how often they recur. The obligation to report the event does not have to manifest itself in weekly or monthly reports.<sup>20</sup> The current federal rule underscores such concerns by requiring that the record be kept "in the course of a regularly conducted activity" and that "making the record was a regular practice of that activity."<sup>21</sup> The Wisconsin rule states only that the record must be made "in the course of a regularly

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knowledge who has a duty to know and report the information"); Cobb State Bank v. Nelson, 141 Wis. 2d 1, 8, 413 N.W.2d 644, 647, 4 U.C.C. Rep. Serv. 2d 1475 (Ct. App. 1987) (internal records of bank within rule).

But see St. Michael Hospital of Franciscan Sisters, Milwaukee v. Milwaukee County, 98 Wis. 2d 1, 8, 295 N.W.2d 189, 194 (Ct. App. 1980) ("We also hold that Form 212 and the Social Summary were admissible evidence under [Wis. Stats. § 908.03(6)]. This section exempts admission of records made in the course of regularly conducted activities from the application of the hearsay rule. We note that the testimony of hospital employee David Anker indicated that one of his responsibilities was to complete Form 212 for patients who appeared unable to pay. The hospital regularly kept such records in the course of its daily operations, and the records were produced at trial by their custodian. Thus Form 212 and the Social Summary were also admissible under this exception to the hearsay rule."); Trinity Memorial Hospital of Cudahy, Inc. v. Milwaukee County, 98 Wis. 2d 220, 226, 295 N.W.2d 814, 817 (Ct. App. 1980) (same).

The quoted language from *St. Michael* is dicta and should be disregarded. The court found that this hearsay was admissible under other exceptions and its analysis of Wis.

Stats. § 908.03(6) is wide of the mark. Since the patients were not employees of the hospital, their statements to the admissions staff cannot be brought within this exception. Other exceptions may, however, apply to the patient's statements.

<sup>20</sup>See 4 Weinstein's Evidence Par. 803(6)[03] at 803-181 (1984). Construing the language in Fed. R. Evid. 803(6) in light of prior practice under the Federal Business Records Act, Judge Weinstein observed:

Numerous courts had stated in dicta that the Act required not only that the record be made in the ordinary course of business, but also that it was the regular course of business to make that particular type of record. A reading of the cases indicates that this second factor was not usually stressed. Records were customarily admitted if made in the course of business without regard to whether the particular type of record was routinely made, except when the court was concerned with trustworthiness of the record.

(citations omitted).

See also McCormick on Evidence § 288 (7th ed.) (discussing "nonroutine" records that are regularly kept and relying on Judge Weinstein). Concerns about trustworthiness in light of the declarant's motive to misrepresent are addressed in the text.

<sup>21</sup>Fed. R. Evid. 803(6)(B), (C).

conducted activity.”<sup>22</sup> Despite the difference in wording, it appears that the federal and state courts apply the rule in about the same way.<sup>23</sup> Wis. Stats. § 908.03(6) should also be contrasted with Wis. Stats. § 908.03(7), dealing with the *absence* of an entry in records of a regularly conducted activity. That exception contains specific language restricting its application to matters which did not appear in the record of a regularly conducted activity, “if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved.” The negative inference contemplated by Wis. Stats. § 908.03(7) may compel a stricter scrutiny of the regularity with which that kind of record was prepared in order to ensure the relevance of the evidence as tending to prove the event never occurred or the record was never made. At any rate, Wis. Stats. § 908.03(6) is satisfied where the event is recorded as part of a regular activity. Questionable records may be excluded for lack of trustworthiness, as discussed below.

### § 803.602 Third-party records

The nature of business practices often entails one business entity relying upon, or even adopting in some manner, the records of another entity. Case law contemplates scenarios where one entity uses the records of another, or adopts, incorporates, or integrates records from another entity into its own records for purposes of § 908.03(6). In commercial cases, especially, an entity frequently relies on records and data prepared by third parties. Debt, for example, is frequently sold to other entities, often multiple times, which generates an enormous number of complex records.

The courts have repeatedly wrestled with the necessary foundation where an entity’s business records are an amalgam of the

<sup>22</sup>See *Johnson v. American Family Mut. Ins. Co.*, 93 Wis. 2d 633, 649, 287 N.W.2d 729, 737 (1980) (trial court properly excluded as hearsay a transcript of a decision by a trial judge in a prior trial on motions after verdict; the rulings by the prior judge were not part of “regularly conducted activity” within the meaning of Wis. Stats. § 908.03(6); the court also rejected the transcript’s admission under Wis. Stats. § 908.03(8) (public records) and Wis. Stats. § 908.03(24) (the residual)).

<sup>23</sup>Congress added this language to the Supreme Court’s proposed version of Fed. R. Evid. 803(6). It was taken from the prior federal rule governing the admissibility of business re-

cords. See House Judiciary Committee Report; House-Senate Conference Committee Report, Rule 803(6).

Despite the difference in wording, it does not appear that the federal courts have required anything more of “routineness” than a relationship to the course of business. See McCormick on Evidence § 288 (7th ed.) (“While an occasional court has focused on the apparent intention of Congress as reflected in the wording of the rule that the making of the memorandum be the ‘regular practice,’ the general focus is much more on whether the basic concern of trustworthiness is met for nonroutine records.”) (note omitted).

entity's own record keeping and third-party records. Simple reliance on a third-party's records is not enough, as it may well entail adopting another entity's mistakes. Some cases involve "integration," namely, situations in which the entity's reliance on a third-party's information extends to "integrating" those records into the entity's own records. Most important are the steps taken to assure "quality control" of the integrated third-party information.<sup>1</sup> The most "prudent approach" is to offer foundation evidence (testimony or certificates) by the record keepers of all entities involved.<sup>2</sup> Time and money, however, are not always easily reconcilable with prudence. In some cases, the court has not

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<sup>1</sup>See *Deutsche Bank Nat. Trust Co. v. Olson*, 2016 WI App 14, ¶ 40, ¶ 42, 366 Wis. 2d 720, 875 N.W.2d 649 (Ct. App. 2015) (bench trial in a mortgage foreclosure case in which a records custodian for the loan servicer, "SPS," provided extensive testimony about the entity's record keeping procedures and the steps taken to assure the quality of information provided by third parties (i.e., predecessor banks): "While we do not doubt that a subsequent loan servicer will typically rely on and integrate the records of a prior loan servicer into its own records in some manner, Johnstone did far more than simply testify that SPS integrated and relied upon the data and information provided by a prior servicer during the boarding process. Rather, Johnstone testified extensively as to her personal knowledge of SPS's policies and procedures for creating its own records and integrating the prior servicer's records when taking over the servicing of a loan from another loan servicer, as well as to the extent that SPS relies on those records in the course of its own regular business practice . . . We also emphasize that Johnstone testified as to the extensive quality control checks—over one-hundred according to her testimony—that SPS conducts when it receives data from a prior loan servicer, and she also explained that any issues that arise during those checks must be resolved prior to completing the on-boarding process. Thus, SPS does more than simply copy and paste a

prior servicer's records into its own, as the Olsons suggest.").

In distinguishing the record in this case from the inadequate records in a prior case, the *Deutsche Bank* court stated:

Thus, the distinction here is that the records that Johnstone testified to were actually records that SPS created, and her testimony established that those records were of the type regularly created in the course of SPS's business. While it is true that the data that SPS relied upon in creating those records came from a prior servicer, SPS integrated Bank of America's records into its own records, and Johnstone testified extensively as to that process and as to how SPS creates its own records in the course of its regularly conducted activity. Contrary to the Olsons' argument, this simply is not a scenario in which a custodian from one entity testified to records created by another entity.

*Deutsche Bank*, at ¶ 46. See also *Brawner v. Allstate Indem. Co.*, 59 F.3d 984, 987 (8th Cir. 2010) (joining other circuits in holding that "a record created by a third party and integrated into another entity's records is admissible as the record of the custodian entity, so long as the custodian entity relied upon the accuracy of the record and the other requirements of the Rule 803(6) are satisfied").

<sup>2</sup>See *Deutsche Bank Nat. Trust Co. v. Olson*, 2016 WI App 14, at fn 16, (where the court closed with the admonition that the most "prudent approach" is the one where the proponent offered affidavits from the third-party record keepers about their own record

been satisfied that the custodial witness, or affiant in a summary judgment setting, has personal knowledge of the third-party entity's record keeping practices, rendering the records inadmissible.<sup>3</sup> The failure, however, is usually one of haste and imprudence; lawyers who anticipate the issue and do their homework, as it were, should not encounter insuperable barriers. In sum, the proponent is responsible for establishing that the record-keeping practices of all entities involved—the party and third-party entities—satisfies the elements of § 908.03(6). This may be accomplished in different ways, including by showing the entity's "integration" of the third-party's records, as discussed above, by presenting evidence from the third-party's record custodian (the "prudent" approach) about those record-keeping procedures, and by evidence from the entity's own custodian in those cases where that custodian has acquired specialized knowledge of the third-party's record-keeping procedures.<sup>4</sup> Modern rules, especially the certificate procedures discussed below,

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keeping practices), citing *Central Prairie Financial LLC v. Doa Yang*, 2013 WI App 82, 348 Wis. 2d 583, 833 N.W.2d 866 (Ct. App. 2013).

<sup>3</sup>*Palisades Collection LLC v. Kalal*, 2010 WI App 38, ¶ 23, 324 Wis. 2d 180, 781 N.W.2d 503 (Ct. App. 2010) (summary judgment motion in which the affidavit filed on behalf of the collection agency that sought judgment on credit card debt incorporated the business records of the bank that issued the card and recorded defendant's debt; held there was insufficient evidence to show that the affiant, who worked for the collection agency, was a "qualified witness" regarding the credit card records: "Turning to Oliphant's affidavit, we conclude it presents no facts that show she has personal knowledge of how the account statements were prepared and whether they were prepared in the ordinary course of Chase's business. The averment that she, as a representative of Palisades, now has control over the records of Jackie Kalal's accounts and has "personally inspected said account and statements regarding the balance due," does not reasonably imply that she has personal knowledge of how Chase prepared the account statements. The averment repeating the substance of [Wis. Stats. § 908.03(6)]

does not suffice in the absence of an averment that she holds or has held a position from which one could reasonably infer that she has some basis for personal knowledge of how Chase prepared the accounts. Because the affidavit does not set forth facts that would make the account statements admissible in evidence, the averment in the affidavit on the balance due is not admissible. Nothing in the affidavit shows that Oliphant has personal knowledge of the amount owed if the account statements are inadmissible to prove the amount."); *Berg-Zimmer & Associates, Inc. v. Central Mfg. Corp.*, 148 Wis. 2d 341, 434 N.W.2d 834, 838 (Ct. App. 1988) (trial court erred in admitting records of a corporate third party where the foundation witness was not an employee of the third party corporation and had no knowledge of the origin of the entries or their correctness).

<sup>4</sup>*Bank of America NA v. Neis*, 2013 WI App 89, ¶ 32, 349 Wis. 2d 461, 835 N.W.2d 527 (Ct. App. 2013) (mortgage foreclosure action in which the court upheld a summary judgment in favor of the bank that purchased the debt; the court of appeals provides a roadmap for assessing the admissibility of documents under Wis. Stats. § 908.03(6), including a close analysis

provide ample opportunities to lay such foundations both efficaciously and inexpensively. There is little excuse for a poor trial record other than poor preparation.

### § 803.603 Foundations: Certificates and witnesses

The foundation for the records described above may be furnished by testimony or by certification. Certification is almost always preferable except in cases where the importance of the records justifies spending trial time showing how they were prepared.

A foundation witness may be the custodian "or other qualified witness." The important factor is whether the witness is familiar with how records of this type are prepared by the organization. Put differently, the witness must have personal knowledge of the record-keeping protocols. The foundation witness need not be a member of the entity, provided he or she is knowledgeable about the record keeping activities.<sup>1</sup> Nor is it necessary that the founda-

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of the payment history, notice of intent to accelerate, and the account information statement along with the underlying affidavits and depositions; held that the affidavits established a *prima facie* showing of admissibility even though some of the averments seemed to "parrot" § 908.03(6): "Stated in *Palisades* terms, Doss-Parker's averments made at least a *prima facie* showing that Doss-Parker had personal knowledge (1) of how the payment history, notice of intent to accelerate, and account information statement, were prepared or created, and (2) that these three documents were prepared in the ordinary course of Bank of America's business. *See Palisades Collection LLC v. Kalal*, 2010 WI App 38, ¶ 21, 324 Wis. 2d 180, 781 N.W.2d 503 (Ct. App. 2010). In other words, her affidavit constituted a showing that she had the requisite personal knowledge and was qualified to testify that the payment history, notice of intent to accelerate, and account information statement '(1) were made at or near the time by, or from information transmitted by, a person with knowledge; and (2) that this was done in the course of a regularly conducted activity.'"; *Central Prairie Financial LLC v. Doa Yang*, 2013 WI App 82, 348 Wis. 2d 583, 833 N.W.2d 866 (Ct. App.

2013) (collections action against cardholder for debt owed plus accrued interest; held that the card member agreement, billing statements, and the "documentation of the sale and assignment of Yang's account" fell within § 908.03(6) and comported with *Palisades* for summary judgment purposes; the court especially noted the "custodian's explanation of the regular processes by which Chase's electronic account records are transmitted to its assignees" (unlike *Palisades*), the affiant's knowledge that pertinent copies were "true and correct," and "[t]hat documentation of the Bill of Sale . . . includes a statement from Chase's authorized representative that Chase's own records 'made at or near the time' of the material events and 'kept in the ordinary course' of Chase's business reflect the existence of Yang's account and the amount of his indebtedness, as well as the affidavit of the records custodian for the intermediary assignee, Global Acceptance, stating that the records of Yang's account reflect the account data furnished by Chase to Global Acceptance at the time of that assignment.").

#### [Section 803.603]

<sup>1</sup> *Schulz v. St. Mary's Hospital*, 81 Wis. 2d 638, 260 N.W.2d 783, 785 (1978) (doctor was an "otherwise qualified

tion witness have any personal knowledge of the information reflected in the record or even the compilation of the report itself. Depending on the “business,” the report may have been made long before the custodian was even hired. The custodial witness’s inability to identify all of the declarants involved in the making of the particular record affects only the weight of the evidence, not admissibility.<sup>2</sup> The foundation may be shown through the routine record keeping practices of the activity, as provided in Wis. Stats. § 904.06.<sup>3</sup>

The same foundation may also be provided through certification procedures that are modeled on the Federal Rules of Evidence.<sup>4</sup> Thus, § 908.03(6) no longer mandates sole reliance on a custodial witness (or a stipulation) to provide the foundation. Proponents may instead rely on the certification procedures set forth in § 909.02(12) or, for foreign records, § 909.02(13). Although not free from doubt, it seems that health care provider records should continue to be governed by the certification procedures set forth in § 908.03(6m), as it is a more specific statute that controls over the more general provisions of § 909.02(12). Traditional practice, of course, permits the proponent to offer evidence under any applicable hearsay exception (“whatever works . . .”), yet § 908.03(6m) contains subpoena limitations and cost reimbursement provisions not found in the ch. 909 rules.

In effect, the certification rules substitute a written certifica-

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witness” who could lay an adequate foundation for hospital records made by Illinois hospitals).

<sup>2</sup>Kuhlman, Inc. v. G. Heileman Brewing Co., Inc., 83 Wis. 2d 749, 759, 266 N.W.2d 382, 387 (1978) (memorandum reflecting cost information was not inadmissible for the reason that it was not possible to determine the number of employees who had engaged in the repair work, the number of hours they had worked, or the wages they had been paid); Hagenkord v. State, 100 Wis. 2d 452, 302 N.W.2d 421 (1981) (lab test results showing that spermatozoa was found in the vaginal washings of a sexual assault victim).

It is not necessary to establish a “chain of custody” for the samples analyzed, absent some special reason to question the information in the hospital records. The “regularity” of

the activity is a sufficient guarantee of reliability. *Bank of America NA v. Neis*, 2013 WI App 89, ¶ 42, 349 Wis. 2d 461, 835 N.W.2d 527 (Ct. App. 2013) (the custodian’s personal knowledge extends to the entity’s record keeping processes, not to the making of the particular records themselves: “Neis cites no authority for the proposition that personal knowledge in this context means what Neis suggests, . . . namely that the witness was present for a record’s preparation or creation . . . the other authorities that the parties have briefed all indicate the contrary.”) (citation omitted).

<sup>3</sup>See § 406.3.

<sup>4</sup>Sup. Ct. Order 2005 WI 48 Comment (“This amendment conforms Wisconsin’s rule to the 2000 amendment of Rule 803(6) of the Federal Rule of Evidence.”).

tion for the testimony of the custodial witness.<sup>5</sup> The authentication provisions of § 909.02(12) largely restate the elements of § 908.03(6). It is strongly suggested that counsel take care to ensure that all elements are addressed in appropriate detail in the custodian's certificate. The amount of detail required depends on the complexity of the records, although bare bones certificates that simply "parrot" the rule may raise otherwise avoidable questions.<sup>6</sup> The certification must accompany the records, whether copies or original. Although the proponent must provide "written notice" to all adverse parties of its intention to rely on the certification procedure, the rule specifies no time certain. Rather, § 909.02(12) provides only that the certification and the records must be made "available for inspection sufficiently in advance of the offer of the record and certification into evidence to provide an adverse party with a fair opportunity to challenge the record and certification." Complex, voluminous records should be noticed well in advance of trial, but it would seem that simple records (e.g., a receipt) demand far less pretrial notice. *no floods*

It also seems that most proponents have little trouble drafting certifications that largely track the rule, so the rules' net effect is to cast the burden on opposing to counsel to inspect the records and certification with care and timely object if something appears amiss. The "fair opportunity" language, then, places corresponding duties on both parties: the proponent must make the records and certification available for inspection within a reasonable time, and opposing counsel must raise objections within a framework that reasonably permits the proponent to address the deficiency or respond accordingly. Finally, the certification procedures are rules of evidence. They do not supersede discovery rules or pretrial orders governing document production. Nor do they preclude counsel from using a "request to admit" as a vehicle for authenticating records.

Hearsay that satisfies the foundational elements of Wis. Stats. § 908.03(6) is not automatically admissible.<sup>7</sup> The trial judge has the power to exclude the evidence where the "sources of informa-

<sup>5</sup>See § 902.12, which addresses domestic business records. Foreign business records are discussed in § 902.13.

<sup>6</sup>See *Bank of America NA v. Neis*, 2013 WI App 89, ¶ 32, 349 Wis. 2d 461, 835 N.W.2d 527 (Ct. App. 2013) (mortgage foreclosure action in which the court upheld a summary judgment in favor of the bank that purchased the debt; the court of appeals provides a roadmap for assessing the admissibil-

ity of documents under § 908.03(6), including a close analysis of the payment history, notice of intent to accelerate, and the account information statement along with the underlying affidavits and depositions; held that the affidavits established a *prima facie* showing of admissibility even though some of the averments seemed to "parrot" § 908.03(6)).

<sup>7</sup>*Rollie Johnson Plumbing & Heating Service, Inc. v. State Dept. of*

tion or other circumstances indicate lack of trustworthiness." The supreme court has stated:

Although the memorandum may meet the requirements of [Wis. Stats. § 908.03(6)], its admission could be denied by the trial court if "the sources of information or other circumstances" surrounding the preparation of the interoffice memorandum "indicate lack of trustworthiness." This language is broad enough to include many facets of untrustworthiness, e.g., the preparant's motive to misrepresent, the failure of the type of record in issue to satisfy the rationale for the exception, and the manner in which the entry was made or kept.<sup>8</sup>

This consideration will most often come into play where there is some question about the motivation behind the making of the record.<sup>9</sup> Documents prepared in "anticipation of litigation" pose special problems. A record prepared prior to litigation, or even "in anticipation" of it, is not a *fortiori* barred from admission. The

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Transp. (Division of Highways), 70 Wis. 2d 787, 792, 235 N.W.2d 528, 531 (1975).

<sup>8</sup>Kuhlman, Inc. v. G. Heileman Brewing Co., Inc., 83 Wis. 2d 749, 761, 266 N.W.2d 382, 387 (1978).

<sup>9</sup>Fed. R. Evid. 803(6) advisory committee's note (citation omitted):

Problems of the motivation of the informant have been a source of difficult and disagreement. In *Palmer v. Hoffman*, 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645 (1943), exclusion of an accident report made by the since deceased engineer, offered by defendant railroad trustees in a grade crossing collision case, was upheld. The report was not "in the regular course of business," not a record of the systematic conduct of the business as a business, said the Court. The report was prepared for use in litigating, not railroading. While the opinion mentions the motivation of the engineer only obliquely, the emphasis on records of routine operations is significant only by virtue of impact on motivation to be accurate. Absence of routineness raises lack of motivation to be accurate. The opinion of the Court of Appeals had gone beyond mere lack of motive to be accurate: the engineer's statement was "dripping with motivations to misrepresent." *Hoffman v. Palmer*, 129 F.2d 976, 991 (C.C.A. 2d Cir. 1942). The direct introduction of motivation is a disturbing factor, since absence of motive to misrepresent has

not traditionally been a requirement of the rule; that records might be self-serving has not been a ground for exclusion. As Judge Clark said in his dissent, "I submit that there is hardly a grocer's account book which could not be excluded on that basis." 129 F.2d at 1002. A physician's evaluation report of a personal injury litigant would appear to be in the routine of his business. If the report is offered by the party at whose instance it was made, however, it has been held inadmissible. The decisions hinge on motivation and which party is entitled to be concerned about it. Professor McCormick believed that the doctor's report or the accident report were sufficiently routine to justify admissibility. Yet hesitation must be experienced in admitting everything which is observed and recorded in the course of a regularly conducted activity . . . . The formulation of specific terms which would assure satisfactory results in all cases is not possible. Consequently the rule proceeds from the base that records made in the course of a regularly conducted activity will be taken as admissible but subject to authority to exclude if "the sources of information or other circumstances indicate lack of trustworthiness."

See also *Kuhlman, Inc. v. G. Heileman Brewing Co., Inc.*, 83 Wis. 2d 749, 760, 266 N.W.2d 382, 388 (1978) (quoting the federal advisory committee's note, in part).

critical consideration is not simply the timing of the record's preparation, but the presence or absence of a motive to misrepresent or distort information.<sup>10</sup> Finally, the current federal rule places the burden of showing "lack of trustworthiness" on the opponent. The federal amendment settles a split among the federal courts, although the Advisory Committee's position is that the language only clarifies the rule and the position taken by "most courts."<sup>11</sup> This approach seems appropriate, especially as it avoids forcing the proponent to prove a negative and recognizes that the opponent has the greatest motive to ferret out problems with the evidence. If the trial court elects to admit the evidence, it may give the jury a cautionary instruction regarding the weight of a record prepared in anticipation of litigation.<sup>12</sup>

### § 908.03(6m) PATIENT HEALTH CARE RECORDS

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

\* \* \*

**(6m) Patient health care records.** (a) *Definition.* In this subsection:

1. "Health care provider" has the meanings given in ss. 146.81(1) and 655.001(8).
2. "Patient health care records" has the meaning given in s. 146.81(4).

(b) *Authentication witness unnecessary.* A custodian or other qualified witness required by sub. (6) is unnecessary if the party who intends to offer patient health care records into evi-

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<sup>10</sup>Kuhlman, Inc. v. G. Heileman Brewing Co., Inc., 83 Wis. 2d 749, 762, 266 N.W.2d 382 (1978) ("Thus under [Wis. Stats. § 908.03(6)] the trial court has discretionary power to exclude evidence which appears to lack the reliability which business records are assumed to have. The trial court's decision to admit or exclude the evidence should be based on its weighing of the factors showing untrustworthiness, e.g., existence of motive and opportunity to prepare an inaccurate record, and the factors assuring reliability of business records, e.g., systematic checking, regularity and continuity in maintaining such records which produce habits of precision, and the business' actual reliance on the figures.") (citations omitted).

See also Reiman Associates, Inc. v. R/A Advertising, Inc., 102 Wis. 2d

305, 319, 306 N.W.2d 292, 300 (Ct. App. 1981) ("We agree with defendant that the critical issue in determining whether a document is untrustworthy as one prepared for use in litigation is the possibility of a motive to misrepresent").

In criminal cases, the defendant's right of confrontation triggers a cluster of different issues. See § 802.301. See State v. Williams, 2002 WI 58, ¶ 33, 253 Wis. 2d 99, 644 N.W.2d 919 (2002) (quoting the treatise).

<sup>11</sup>Fed. R. Evid. 803(6) Advisory Committee Note (2014 amendment).

<sup>12</sup>For an example of one such instruction, see Reiman Associates, Inc. v. R/A Advertising, Inc., 102 Wis. 2d 305, 316 n.9, 306 N.W.2d 292, 298-99 n.9 (Ct. App. 1981).

dence at a trial or hearing does one of the following at least 40 days before the trial or hearing:

1. Serves upon all appearing parties an accurate, legible and complete duplicate of the patient health care records for a stated period certified by the record custodian.
2. Notifies all appearing parties that an accurate, legible and complete duplicate of the patient health care records for a stated period certified by the record custodian is available for inspection and copying during reasonable business hours at a specified location within the county in which the trial or hearing will be held.

(bm) *Presumption.* Billing statements or invoices that are patient health care records are presumed to state the reasonable value of the health care services provided and the health care services provided are presumed to be reasonable and necessary to the care of the patient. Any party attempting to rebut the presumption of the reasonable value of the health care services provided may not present evidence of payments made or benefits conferred by collateral sources.

(c) *Subpoena limitations.* Patient health care records are subject to subpoena only if one of the following conditions exists:

1. The health care provider is a party to the action.
2. The subpoena is authorized by an *ex parte* order of a judge for cause shown and upon terms.
3. If upon a properly authorized request of an attorney, the health care provider refuses, fails, or neglects to supply within 2 business days a legible certified duplicate of its records for the fees under s. 146.83 (1f) or (3f), whichever is applicable.

#### AUTHOR'S COMMENTS

##### § 803.6m Health care provider records

##### § 803.6m Health care provider records

This rule is a special application of the exception for records of a regularly conducted activity, Wis. Stats. § 908.03(6). Compliance with the modest procedures set forth in Wis. Stats. § 908.03(6m) obviates the need to lay a foundation for the records through a custodial witness. The special exception applies to the records of a "health care provider," which is defined by subsection (a).

The rule was originally limited to "hospital records" but was

later expanded to cover other health care providers.<sup>1</sup> Other rules, especially Wis. Stats. § 909.02(12) also permit the use of certifications to provide the foundation for all manner of records of regularly conducted activities. Indeed, § 908.03(6m) substantially overlaps with Wis. Stats. § 909.02(12) although there are important differences, namely, the 40-day notice provision and the presumption of reasonableness in § 908.03(6m). Nothing on the rule's face mandates that health care records may only be offered under the auspices of § 908.03(6m). Thus, a proponent may offer health care records through § 909.02(12), or a stipulation for that matter, and still assert the presumption found in § 908.03(6m).

Although it dramatically streamlines the procedural and evidentiary hurdles otherwise necessary to introduce such records, the health care records rule does not eliminate the requirements of Wis. Stats. § 908.03(6). Rather, it permits them to be shown in shorthand form without a foundational witness.

At least 40 days before the trial or hearing the proponent must serve copies of the pertinent records on all parties or provide the notification specified in the rule.<sup>2</sup> The copies must be accurate, legible, and complete, as certified by the records custodian. The present rule does not require that copies be filed with the court.<sup>3</sup> The notice option alerts parties that they may inspect and copy the records during "reasonable business hours" somewhere within the county where the trial or hearing will be held. Whether to provide the copies in the first instance or simply provide the statutory notice is counsel's option. Normally the notice option is most appropriate where records are voluminous and the subject matter not likely to be hotly contested.

Compliance with the rule largely disables the parties from subpoenaing the records at the trial or hearing. Subsection (b) of Wis. Stats. § 908.03(6m) limits the authority to subpoena health care provider records in light of the expansive provisions for admissibility by certification under subsection (a). Subpoenas are nevertheless available when the health care provider is itself a party to the action, when the judge is satisfied that "cause" has been shown, or when the provider refuses or neglects to provide the copies despite statutory compliance. Fees for copies are now governed by administrative regulations.

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**[Section 803.6m]**

<sup>1</sup>See Supreme Court Order, October 30, 1990, Judicial Council's Note, 158 Wis. 2d xxviii-ix.

<sup>2</sup>The old hospital records version of Wis. Stats. § 908.03(6m) carried

only a ten-day period, and the copies had to be filed with the court.

<sup>3</sup>Wis. Stats. § 908.03(6m) (amended) Judicial Council Committee's Note ("elimination of the filing requirement reduces courthouse records management impacts").

Wis. Stats. § 908.03(6m) rests upon the experience that normally the foundation for health care provider records is straightforward and seldom disputed. The rule therefore places the onus on opposing counsel to inspect the records and ascertain whether there is any valid ground for objection. Compliance with Wis. Stats. § 908.03(6m) does not ensure admissibility. Health care provider records are subject to all objections that may be lodged against records admitted under Wis. Stats. § 908.03(6). For example, multiple layers of hearsay should be closely scrutinized. Statements by non-employees must be qualified under some other hearsay exception if offered for the truth of the matter asserted.<sup>4</sup> Nor is the analysis limited to hearsay. The records must also be relevant and is subject to exclusion under Wis. Stats. § 904.03.

While convenient for records custodians, the rule permits what may be a thick packet of medical records to be offered into evidence without any supporting testimony. Medical records usually contain technical nomenclature and data that are far beyond the understanding of persons lacking a medical education. Where there is a substantial risk that the records may induce confusion or mislead the trier of fact, the trial court may limit their admissibility or predicate their use upon testimony by experts.<sup>5</sup> Even under Wis. Stats. § 908.03(6), the courts will exclude otherwise qualified opinions expressed solely in the medical records if they "require explanation or a detailed statement of the judgmental factors upon which the diagnosis or opinion is based."<sup>6</sup>

Subsec. (bm)<sup>7</sup> created a presumption that billing statements and invoices "state the reasonable value of the health care services provided and the health care services provided are presumed to be reasonable and necessary to the care of the patient." The presumption is governed by Wis. Stats. § 903.01. The basic facts of the presumption are:

- The documents are billing statements or invoices;

<sup>4</sup>Such statements may be admissible under Wis. Stats. § 908.03(4), as pertaining to medical diagnosis or treatment.

<sup>5</sup>Wis. Stats. § 904.03. See *Hagenkord v. State*, 100 Wis. 2d 452, 302 N.W.2d 421 (1981) (medical student with no connection to the case was properly allowed to testify as a medical "lexicographer" and interpret medical terminology contained in voluminous hospital records).

<sup>6</sup>*Pophal v. Siverhus*, 168 Wis. 2d 533, 484 N.W.2d 555, 560 (Ct. App. 1992) (appeal from a judgment dis-

missing plaintiff's medical malpractice case; held that the trial judge properly excluded opinions or diagnoses by three treating physicians, none of whom testified, regarding the onset of plaintiff's cerebral palsy; although all of the opinions qualified under Wis. Stats. § 908.03(6), the court held that the hearsay may still be excluded if it "requires explanation or a detailed statement of the judgmental factors upon which the diagnosis or opinion is based." ).

<sup>7</sup>2009 Wis Act 28, § 3285gh.

• Those same documents are "patient health care records" within the meaning of Wis. Stats. § 146.81(4).

The proponent bears both the burden of production and the burden of persuasion with respect to the basic facts. See § 301.4. Not every "bill" for medical services fits this narrow definition.<sup>8</sup>

If the proponent establishes the basic facts, the presumed facts are (1) that the amounts charged are for a "reasonable value" and (2) that the services themselves were "reasonable and necessary" for the patient's care. The presumptive effect of the rule means that the opposing party has both the burden of producing evidence and the burden of persuasion in negating the presumed facts. Put differently, the burden is on the opposing party to show that the amounts are "unreasonable" and that the services rendered were unreasonable and unnecessary.

In criminal cases, a defendant's Sixth Amendment confrontation right may affect the admissibility of records under this rule, especially when health care records contain more than "clinical and nondiagnostic" evidence. See § 802.3. "Clinical and nondiagnostic" evidence is generally defined as "information that would not be disputed by trained medical personnel"; more precisely it consists of "the objective findings of medical personnel, for example, temperature, x-ray results, and lab test results." It also includes patients' statements made for purposes of treatment. Manifestly not included are "the impressions, opinions, conclusions and diagnoses of the medical staff."<sup>9</sup>

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<sup>8</sup>See § 301.4. *Correa v. Farmers Ins. Exchange*, 2010 WI App 171, ¶ 8, 330 Wis. 2d 682, 794 N.W.2d 259 (Ct. App. 2010) (holding that some of the records fell within the definition, such as an ambulance bill and a "compilation of charges" submitted by a neurological clinic, but others did not, such as one document entitled "paid Medicaid claims").

<sup>9</sup>For the criminal defendant's right of confrontation, see § 802.3. See *State v. Ellington*, 2005 WI App 243, ¶ 16, 288 Wis. 2d 264, 707 N.W.2d 907 (Ct. App. 2005) (implicitly holding that *Rundle* (below) comports with *Crawford v. Washington* and that no error occurred when a detective, reading from the medical records at trial, related various "objective findings" as well as the victim's narrative of events made to medical personnel).

*State v. Rundle*, 166 Wis. 2d

715, 728–29, 480 N.W.2d 518, 524 (Ct. App. 1992), where the defendant was convicted of 3 counts of physical child abuse. The court of appeals construed *Hagenkord v. State*, 100 Wis. 2d 452, 302 N.W.2d 421 (1981), as not requiring the presentation of medical records through an expert witness for Sixth Amendment confrontation purposes. In *Rundle*, the diagnostic portions of the records were read to the jury; scientific terms were not explained in any way. *Rundle* held that *Hagenkord* and the confrontation right should be construed as limiting the introduction of medical records without supporting testimony to evidence that is "clinical and nondiagnostic," which it defined as "objective medical findings" and statements of the patient/victim. The court explained:

*Hagenkord* does not define "clinical and nondiagnostic" evidence. However, "clinical and nondiagnostic" evidence

**§ 908.03(7) ABSENCE OF ENTRY IN RECORDS OF REGULARLY CONDUCTED ACTIVITY**

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

\* \* \*

**(7) Absence of entry in records of regularly conducted activity.** Evidence that a matter is not included in the memoranda, reports, records or data compilations, in any form, of a regularly conducted activity, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

**AUTHOR'S COMMENTS**

§ 803.7 Absence of entry in records of regularly conducted activity

**§ 803.7 Absence of entry in records of regularly conducted activity**

This rule is the proverbial hole in the hearsay doughnut. Although styled an exception, Wis. Stats. § 908.03(7) applies to the *absence* of a statement in a record. Thus, it is more appropriately conceptualized as a rule of circumstantial evidence that is placed among the hearsay exceptions more for convenience than

can be defined as the objective findings of medical personnel, for example, temperature, x-ray results, and lab test results. Generally, "clinical and nondiagnostic" evidence is any information that would not be disputed by trained medical personnel. Also included would be statements of the patient/victim describing the source of the injury and giving an evaluation of the injury. The patient/victim's statements can be classified as "clinical and nondiagnostic" for two reasons. First, the patient/victim's strong motivation for proper treatment will insure trustworthiness of the information provided to medical staff. Second, any medical staff transcribing the statements would have been found qualified to do so and would have strong motivation to prepare them accurately because of professional dictates and the fact that others will rely upon the work.

Excluded from "clinical and nondiagnostic" evidence are the impressions,

opinions, conclusions and diagnoses of the medical staff. These subjective findings of the medical staff are based on their interpretation of the "clinical and nondiagnostic" information contained in the medical records.

480 N.W.2d at 524.

Error occurred because the records related "the medical staff's impressions, suspicions and diagnoses." None of the declarants testified. With respect to the court's remarks about the patient/victim's statement, these statements are often independently admissible under Wis. Stats. § 908.03(4) (statements made for purposes of medical diagnosis or opinion). Resort to Wis. Stats. § 908.03(6m) is necessary only where the patient's statements are contained in the health care records in question.

doctrinal consistency.<sup>1</sup> From the absence of an entry, one infers the nonexistence or nonoccurrence of the matter. The Wisconsin rule is similar to the federal rule.<sup>2</sup>

Wis. Stats. § 908.03(7) broadly applies to memorandums, reports, records, or data compilation, in any form, of regularly conducted activities. The absent entry must concern a matter that is regularly observed and recorded when it occurs. In effect the custodian is testifying, "If the event occurred, we'd have a record of it. Because we have no such record, it didn't happen as far as we know."<sup>3</sup> Thus, the foundation under Wis. Stats. § 908.03(7) is identical to that required by Wis. Stats. § 908.03(6) except that the custodial witness has no record of the entry in question. The foundation for the routine activity may be established under Wis. Stats. § 904.06.<sup>4</sup>

Even where the evidence fits within the letter of the exception, the trial judge has the authority to exclude it where the sources of information or other circumstances indicate lack of trustworthiness.<sup>5</sup>

### § 908.03(8) PUBLIC RECORDS AND REPORTS

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

#### [Section 803.7]

<sup>1</sup>Wis. Stats. § 908.03(7) Judicial Council Committee's Note ("This exception is in accord with Scalzo v. Marsh, 13 Wis. 2d 126, 136, 108 N.W.2d 163, 168 (1961). Technically it is not a hearsay exception but circumstantial evidence. Nonetheless, it seems conveniently appropriate."). See also Fed. R. Evid. 803(7), advisory committee's note ("Failure of a record to mention a matter which would ordinarily be mentioned is satisfactory evidence of its nonexistence. Uniform Rule 63(14), Comment. While probably not hearsay as defined in Rule 801, decisions may be found which class the evidence not only as hearsay but also as not within any exception. In order to set the question at rest in favor of admissibility, it is specifically treated here.").

<sup>2</sup>See McCormick on Evidence § 287 (7th ed.). In 2014 the Supreme Court amended Fed. R. Evid. 803(7) to explicitly impose the burden of showing any lack of trustworthiness on the

opponent. The amendment conforms to identical revisions of Fed. R. Evid. 803(6) and 803(8). Current Fed. R. Evid. 803(7) states:

**(7) Absence of a Record of a Regularly Conducted Activity.** Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness.

<sup>3</sup>The rule creates only a permissive inference and not a presumption, at least absent a specific statute or case to the contrary. See § 301.2.

<sup>4</sup>See § 406.1.

<sup>5</sup>See the discussion in § 803.601 in connection with the identical language in Wis. Stats. § 908.03(6).

**(8) Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law, or (c) in civil cases and against the state in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

#### AUTHOR'S COMMENTS

##### § 803.8 Public records and reports

##### § 803.8 Public records and reports

This rule sets forth a hearsay exception for certain kinds of records and reports generated by public offices and agencies ("public records"). Although Wis. Stats. § 908.03(8) embraces most kinds of governmental reports, other rules may also apply, such as the exception for vital statistics in Wis. Stats. § 908.03(9). Public records may be self-authenticated by certified copies as provided by § 909.02(4); certified copies also comply with the original writings rule, § 910.05. Certification eliminates the need to call a foundational witness.

The exceptions for public records and "business records," Wis. Stats. § 908.03(6), are related yet different. Although many public records may qualify under both exceptions,<sup>1</sup> private businesses obviously are not public agencies. The foundation for public records under this exception also reflects considerable trust in the integrity, responsibility, and efficiency of public employees, unlike the business records exception which relies primarily on routine, regularity, and repetition. Thus, there is no requirement that the public record be one that is regularly made or that the record entry be made "at or near the time" of the event observed, as required for business records. Delayed reports are permissible, unless specific questions are raised about the statement's trustworthiness.

The public records exception, which originated in the common law, rests on several public policy assumptions. First, it is assumed that public officials and employees carefully and diligently perform their duties and honestly record their activities as

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##### [Section 803.8]

<sup>1</sup>State v. Nowakowski, 67 Wis. 2d 545, 562, 227 N.W.2d 697, 705 (1975) (abrogated on other grounds by, State v. Petrone, 161 Wis. 2d 530, 468 N.W.2d 676 (1991)) (county highway committee meeting minutes).

U.S. v. Hayes, 861 F.2d 1225, 89-1 U.S. Tax Cas. (CCH) P 9203, 27 Fed. R. Evid. Serv. 55, 63 A.F.T.R.2d 89-306 (10th Cir. 1988) (IRS records in tax prosecution admissible under both).

required by law. Second, the public interest is not served by requiring government officials and employees to take time away from their duties to testify about such matters. Finally, there is often little likelihood that the declarant would have any clearer recollection of matters than what is found in the report. The Wisconsin rule is based on Fed. R. Evid. 803(8); the differences are discussed below.<sup>2</sup>

Wis. Stats. § 908.03(8) embraces records, reports, statements, or data compilations, in any form. This broad listing has created no difficulties in the case law. The term "statements" is effectively all-consuming and controls regardless of the report's form; it apparently incorporates the definition of "statement" in Wis. Stats. § 908.01(1), namely, did the declarant intend to communicate a fact, condition, or opinion?<sup>3</sup> The term "data compilation" applies to electronically stored information.<sup>4</sup>

The record must be that of a public office or agency. Reports made by private individuals, even those acting within a public capacity, do not constitute reports, statements, or findings by a "public office or agency" within the meaning of Wis. Stats. § 908.03(8).<sup>5</sup> The rule places no limit on the kind of governmental office. It may include federal, state, or local governmental offices or agencies.

<sup>2</sup>See Fed. R. Evid. 803(8) advisory committee's note. Current Fed. R. Evid. 803(8) states:

(8) **Public Records.** A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

<sup>3</sup>Section 801.2.

<sup>4</sup>Wis. Stats. § 908.03(8) Judicial Council Committee's Note ("The addition of data compilations to the exception is consistent with the general treatment of these sections and recognizes the modern form of record-keeping.").

<sup>5</sup>See *Matter of Guardianship of R.S.*, 162 Wis. 2d 197, 470 N.W.2d 260 (1991), where the supreme court discussed the admissibility of a report prepared by a psychologist concerning a guardianship, prepared under § 880.33(1). The circuit court erred when it admitted the report under Wis. Stats. § 908.03(8). The supreme court explained:

The court of appeals concluded, and we agree, that the psychologist's report does not fit within the [Wis. Stats. § 908.03(8)] exception to hearsay because the report does not constitute a report, statements or findings of a "public office or agency" within the meaning of [Wis. Stats. § 908.03(8)]. Though the psychologist may be hired frequently by Milwaukee county for competency evaluations, he is a private practitioner, not a public office or agency. The psychologist prepared his report in his private capacity as a consulting psychologist, and the report does not qualify as the factual finding of a public office or agency within [Wis. Stats. § 908.03(8)].

470 N.W.2d at 263.

Many government records consist of multiple layers of hearsay. Official A observes something, relates the information to Official B who in turn passes it on to Official C, who formally records the matter. Multiple layers of hearsay may be admissible under the public records exception provided that all declarants are members of the agency charged with the record's preparation and all are under a lawful duty to report the matter.<sup>6</sup> All declarants must have personal knowledge of the matters observed.<sup>7</sup>

Wis. Stats. § 908.03(8) describes three broad categories of public records and reports: (a) records setting forth the activities of the office or agency; (b) matters observed pursuant to a duty imposed by law; and (c) investigative reports. Although the categories undoubtedly overlap, it is only necessary that the hearsay fits within any one of them.<sup>8</sup> Not every formal document or, for that matter, scrap of paper generated by a governmental office or agency will fit within these categories despite their breadth.<sup>9</sup>

The admissibility of records under any one of the three categories is a preliminary question of admissibility entrusted to the sound discretion of the trial judge.<sup>10</sup> The judge may examine the report itself while looking to statutes and regulations in determining the reporting duties and authority of a public office or agency. For this reason, the public records exception does not require testimony by a custodial witness or a certification of authentication to provide the foundation. Such options are avail-

<sup>6</sup>State v. Gilles, 173 Wis. 2d 101, 496 N.W.2d 133 (Ct. App. 1992) (public records exception, like the business records exception, requires that all declarants be members of the organization responsible for the record's preparation; crime lab analyst's oral statement to a police officer was not within Wis. Stats. § 908.03(8), which otherwise applied to the police report, and the proponent failed to demonstrate the applicability of any other exception covering the analyst's statement).

<sup>7</sup>See § 805.1. When multiple layers of hearsay are present, some declarant's personal knowledge will be limited to what they were told by another public employee.

<sup>8</sup>See Matter of Sullivan, 218 Wis. 2d 458, ¶ 26, 578 N.W.2d 596 (1998) (held that a DOT pamphlet describing the effects of intoxication was admissible in order to support their theory that the death was accidental). *Sul-*

*livan* did not expressly address which category the DOT pamphlet fell within, yet it appears that the document was admissible under both (b) (matters observed pursuant to a duty imposed by law) and (c) (evaluative report setting forth factual findings). 218 Wis. 2d 458 at ¶ 22.

See McCormick on Evidence § 296 (7<sup>th</sup> ed); Mueller & Kirkpatrick, Evidence § 8.49 (2d ed.) (the separate clauses do not create "watertight compartments").

<sup>9</sup>See, e.g. *Johnson v. American Family Mut. Ins. Co.*, 93 Wis. 2d 633, 649, 287 N.W.2d 729, 737 (1980) (transcript of a decision by the prior trial judge in the case setting forth his observations on the adequacy of the damages at a post-verdict hearing could not be admitted as substantive evidence of damages under Wis. Stats. § 908.03(8) at a subsequent trial).

<sup>10</sup>See § 104.1.

able but are not always needed. The gravamen of the foundation is whether the government office or agency was lawfully obligated and empowered to produce the record. Thus the trial judge may take judicial notice of the statutes and administrative regulations that apply to the record and will, of course, consider the record itself in deciding if it conforms to those laws.<sup>11</sup> Everywhere the report fits within the letter of Wis. Stats. § 908.03(8) the trial court retains the discretion to exclude it in whole or part where the sources of information or other circumstances indicate lack of trustworthiness.<sup>12</sup> Authentication is governed by Wis. Stats. ch. 909.

*Activities of the office or agency.* Subsection (a) permits the introduction of records setting forth the activities of public offices or agencies. A treasurer's office, for example, is duty bound to record receipts and disbursements that are directed to it.<sup>13</sup> Regardless of the activity, however, a public employee or official must have personal knowledge of the matter recorded. Records of this type are admissible by either party in a civil or criminal proceeding. The statutes authorizing the agency's function in turn controls the type of documents that fall within subsec. (a).

*Matters observed pursuant to a duty imposed by law.* Subsection (b) applies to records of matters observed pursuant to a duty imposed by law. The existence of a legal duty is ordinarily determined by the statutes or regulations empowering the particular agency. There is no precise distinction between subsecs. (a) and (b), yet it seems that the latter contemplates more of an active role for the agency outside the drab confines of the office itself. The types of reports may span from the innocuous (e.g., the recording of rainfall) to somewhat more complex observation such as the effect of intoxicants on human beings or a list of driver's past traffic offenses.<sup>14</sup> The permissible subject matter is

<sup>11</sup>See *Lievrouw v. Roth*, 157 Wis. 2d 332, 459 N.W.2d 850, 858 (Ct. App. 1990).

<sup>12</sup>In 2014 the Supreme Court amended Fed. R. Evid. 803(8) to explicitly state that the opponent bears the burden of showing any lack of trustworthiness. The amendment was consistent with revisions to Fed. R. Evid. 803(6) and 803(7) and reinforced the policy rationales underlying this rule. See Fed. R. Evid. 803(8) Advisory Committee's Note (2014 amendment) ("While most courts have imposed that burden on the opponent, some have not. Public records have

justifiably carried a presumption of reliability, and it should be up to the opponent to 'demonstrate why a time tested and carefully considered presumption is not appropriate.'") (citations omitted).

<sup>13</sup>See McCormick on Evidence § 296 (7th ed.) (using the example in the text).

Fed. R. Evid. 803(8) advisory committee's note (examples given from older cases).

<sup>14</sup>See *Matter of Sullivan*, 218 Wis. 2d 458, 578 N.W.2d 596 (1998), where the deceased's family challenged a coroner's report that concluded that

defined by the statutes or rules authorizing the record or report.<sup>15</sup>

Either party in any action, civil or criminal, may offer records of matters observed pursuant to legal duty. The admission of such evidence is subject to the trial court's power to exclude it if the sources of the information or other circumstances indicate lack of trustworthiness.

Where multiple levels of hearsay are involved, each layer must be qualified under some exception to the hearsay rule if relied upon for the truth of the matter asserted. Wis. Stats. § 908.03(8) embraces only statements made by public agents or employees in the compilation of the report. Statements by citizens to public officers or employees (e.g., 911 calls) must qualify under some other exception to the hearsay rule.<sup>16</sup> The same holds for statements made by public employees who are not members of the agency

had committed suicide. The court held that the family should have been permitted to introduce a DOT pamphlet describing the effects of intoxication in order to support their theory that the death was accidental.

The pamphlet is a compilation of a public agency, the Wisconsin Department of Transportation. It contains information on the pharmacology and toxicology of alcohol and on the specific effects of alcohol. The findings and statistical data in the pamphlet pertaining to the effects alcohol has on a person are factual and were made pursuant to the department's duty to administer and enforce the laws relating to the licensing of drivers, see [Wis. Stats. § 343.02], and its duty to employ and train state traffic officers, see [Wis. Stats. § 110.065] and [Wis. Stats. § 110.07]. Accordingly, excerpts from the pamphlet concerning alcohol and its effects on a person's judgment, emotions, and perception satisfy the requirements of the hearsay exception for public records and reports contained in [Wis. Stats. § 908.03(8)].

218 Wis. 2d 458 at ¶ 26. *Sullivan* relied upon *State v. Hinz*, 121 Wis. 2d 282, 288–89, 360 N.W.2d 56 (Ct. App. 1984) (holding admissible a blood alcohol chart in the DOT training pamphlet) and *Lievrouw v. Roth*, 157 Wis. 2d 332, 459 N.W.2d 850, 858 (Ct. App. 1990) (suggesting that pages from the *Wisconsin Motorist Handbook*

that concerned the effects of alcohol on driving may have been admissible under Wis. Stats. § 908.03(8)(b) or (c)).

*State v. Leis*, 134 Wis. 2d 441, 445, 448, 397 N.W.2d 498, 500, 501 (Ct. App. 1986) (defendant's driving record admissible as public record; although the court did not specify which category the driving record fit into, it did observe that “[a] driving record reports historical facts about the driver and contains neither opinions nor conclusions”).

Fed. R. Evid. 803(8) Advisory Committee's note (reciting examples from older cases).

*McCormick on Evidence* § 296 (7th ed.) (rainfall records by the National Weather Service).

<sup>15</sup> See *Neuman v. Circuit Court*, 231 Wis. 2d 440, ¶ 8, 605 N.W.2d 280 (Ct. App. 1999) (statute authorizing death certificates “limited the amount of information required on a death certificate to the cause of death and the evolution of the disease”).

<sup>16</sup> See *Boyer v. State*, 91 Wis. 2d 647, 661, 284 N.W.2d 30, 35 (1979) (police report constituted triple hearsay, since the report (level one) recorded the statements of X (level two) describing what Y had said (level three); only level one, the police report, fell within Wis. Stats. § 908.03(8)).

that made the report.<sup>17</sup>

The Wisconsin rule differs from Fed. R. Evid. 803(8), which excludes "in criminal cases matters observed by police officers and other law enforcement personnel." Despite the disparity, the differences are minimized in practice because of the Sixth Amendment right to confrontation.<sup>18</sup> The exclusionary language in Fed. R. Evid. 803(8)(B) has been interpreted as applying only to evidence offered by the prosecution against the defendant. Moreover, the criminal exclusion is inapplicable to "routine, nonadversarial records."<sup>19</sup>

*Investigative reports.* The most problematic form of public report is the investigative, or evaluative, report.<sup>20</sup> Wis. Stats. § 908.03(8)(c) changed Wisconsin law by permitting the introduction of "factual findings" resulting from an investigation conducted pursuant to authority granted by law.<sup>21</sup> The investigations are

<sup>17</sup>See *State v. Gilles* (described above).

<sup>18</sup>See § 802.301. Public records that constitute testimonial hearsay are inadmissible unless they satisfy the stringent *Crawford* test. In a case decided before *Crawford* (2004), the Wisconsin Supreme Court excluded a state crime laboratory report from the business records exception because it was prepared in anticipation of litigation. That same reasoning would render that same report testimonial hearsay for confrontation purposes. See *State v. Williams*, 2002 WI 58, ¶ 39, 253 Wis. 2d 99, 644 N.W.2d 919 (2002) (modifying ¶ 33), which quotes § 803.6 of the treatise.

<sup>19</sup>*McCormick on Evidence* § 296 (7th ed.).

<sup>20</sup>*Staskal v. Symons Corp.*, 2005 WI App 216, ¶¶ 17-21, 287 Wis. 2d 511, 706 N.W.2d 311, 203 Ed. Law Rep. 811 (Ct. App. 2005) (summarized below).

Fed. R. Evid. 803(8) advisory committee's note ("The disagreement among the decisions has been due in part, to the variety of situations encountered, as well as to differences in principle.")

For a case discussing § 908.03(8) in general terms without specifically identifying whether the report fell

within subsec. (b) or (c), see *S.C. Johnson & Son, Inc. v. Morris*, 2010 WI App 6, ¶ 42, 322 Wis. 2d 766, 779 N.W.2d 19, R.I.C.O. Bus. Disp. Guide (CCH) P 11802 (Ct. App. 2009) (civil action against a company's former employees and other businesses arising out of a bribery-kickback fraud perpetrated over a number of years; held that the trial court did not abuse its discretion in admitting under § 908.03(8) "redacted affidavits from the reports of two federal government law enforcement agents" that described a similar conspiracy between the plaintiff's former employee and the employee of still another transportation company).

<sup>21</sup>Wis. Stats. § 908.03(8) Judicial Council Committee's Note:

The principal change in Wisconsin law that this section effectuates is found in item (c). The test of admissibility that has evolved in a line of Wisconsin cases, culminating in *Wilder v. Classified Risk Ins. Co.*, 47 Wis. 2d 286, 177 N.W.2d 109 (1970), is whether the maker of the report could testify to its contents if present in court. See *Estate of Shega*, 38 Wis. 2d 269, 275, 156 N.W.2d 392, 395 (1968); *Novakofski v. State Farm Mut. Auto. Ins. Co. of Bloomington, Ill.*, 34 Wis. 2d 154, 158, 148 N.W.2d 714, 717 (1967); *Huss v. Vande Hey*, 29 Wis. 2d 34, 42, 138 N.W.2d 192, 196 (1965); note to Exception (6). Opinions or conclusory facts

generally conducted by administrative and regulatory agencies.<sup>22</sup> A civil or criminal judgment, including a judge's careful findings of fact, are not within this exception's reach because a judicial proceeding is not an investigation.<sup>23</sup> (Statutes authorizing public investigations that also explicitly provide for the admissibility of the agency's findings should be scrutinized under § 908.02 as creating a distinct hearsay exception.<sup>24</sup>) Concerns about the confrontation right of the criminal defendant motivated the qualification that the factual findings are admissible only in civil cases and against the government in criminal cases.<sup>25</sup> Despite the rule's exclusionary language, the constitutional right of confrontation effectively delimits the prosecution's use of such reports in criminal trials.<sup>26</sup>

The investigation described in the record or report must be legally authorized. The report's trustworthiness is a direct product of the declarants' legal duty to investigate and accurately record their findings. Typically, the agency's procedures and duties are set forth in the statutes or regulations that govern the inquiry, which also circumscribe the report's scope. Put differently, the report may address only those issues or incidents so authorized by law. The investigation may involve discrete events (a workplace injury) or broader issues.<sup>27</sup> The trial judge is not bound by the Rules of Evidence in determining whether the investiga-

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based upon hearsay thus have been inadmissible. On its face, it seems a rational application of the multiple hearsay rule ([Wis. Stats. § 908.05]). However, it tends to overlook the rule that experts may base an opinion upon facts or data, if a type reasonably relied upon by experts in the particular field, that are not otherwise admissible in evidence ([Wis. Stats. § 907.03]) and the further rule ([Wis. Stats. § 907.01]) that lay opinion or inference is admissible if rationally based upon the perception of the witness. Defining the boundary between the competing principles is possible only on a case-by-case basis but it must be conceded that this exception makes broader admissibility possible. A similar result but to a much lesser extent may occur with respect to item (b) and it is possible that a negligible change could occur with respect to item (a).

<sup>22</sup>See McCormick on Evidence § 296 (7th ed.); Giannelli, *Understanding Evidence* § 33.12 (4th ed.).

<sup>23</sup>Johnson v. American Family Mut. Ins. Co., 93 Wis. 2d 633, 649, 287

N.W.2d 729, 737 (1980) (transcript of a decision by the prior trial judge in the case setting forth his observations on the adequacy of the damages at a post-verdict hearing could not be admitted as substantive evidence of damages under Wis. Stats. § 908.03(8) at a subsequent trial).

<sup>24</sup>Fed. R. Evid. 803(8) advisory committee's note (providing examples found in federal law).

<sup>25</sup>State ex rel. Prellwitz v. Schmidt, 73 Wis. 2d 35, 242 N.W.2d 227 (1976) (probation revocation hearing was not a "criminal prosecution" within the meaning of Wis. Stats. § 908.03(8)(c); probation department records showing defendant's failure to comply were admissible against him in the hearing).

<sup>26</sup>The confrontation right is discussed in § 802.3.

<sup>27</sup>See Matter of Sullivan, 218 Wis. 2d 458, 578 N.W.2d 596 (1998) (where the deceased's family challenged a coroner's report that concluded that he

tion was authorized by law and may take judicial notice of the applicable statutes.<sup>28</sup> Absent evidence to the contrary, the law assumes the trustworthiness of an authorized report by a government agency.<sup>29</sup>

Evaluative reports are fertile grounds for hearsay. Investigators commonly interview lay people who may have personal knowledge or hearsay information that is helpful. Private experts are often used as well. When such third party statements are later incorporated into the investigative report, they represent additional layers of hearsay. If the inquiry was carried out with lawful authority, Wis. Stats. § 908.03(8)(c) encompasses the additional layers of hearsay. The trial judge may exclude them if the sources of information or other circumstances indicate a lack

had committed suicide, held that the family should have been permitted to introduce a DOT pamphlet describing the effects of intoxication in order to support their theory that the death was accidental, relying on *Hinz*, below).

*Neuman v. Circuit Court*, 231 Wis. 2d 440, ¶¶ 8-9, 605 N.W.2d 280 (Ct. App. 1999) (statute authorizing death certificates "limited the amount of information required on a death certificate to the cause of death and the evolution of the disease"; it would be "absurd" to require the death certificate to include the "deceased's medical history," which "may go on for volumes").

*Lievrouw v. Roth*, 157 Wis. 2d 332, 459 N.W.2d 850, 858 (Ct. App. 1990) (pages from the Wisconsin Motorist Handbook concerning alcohol-impaired driving were admissible under subsec. (c)).

*State v. Hinz*, 121 Wis. 2d 282, 288, 360 N.W.2d 56, 60 (Ct. App. 1984) (blood alcohol chart showing alcohol concentration in the blood based upon time, body weight and amount consumed admissible as "factual finding" under Wis. Stats. § 908.03(8) and Wis. Stats. § 908.03(24)). The court in *Hinz* explained:

The blood alcohol chart is a compilation of a public agency, the department of transportation. Its findings are factual and were made in furtherance of

its authority to train traffic officers. See [Wis. Stats. § 110.065]. In this case the trial court suggested that this exception applied, although ultimately excluding the blood alcohol chart on the basis of its potential for confusing the jury. Other decisions have suggested that stopping distance charts are admissible under this exception. [Citation omitted.]

For the wide range of investigative reports within subsec. (c), see the examples collected at McCormick on Evidence § 296 (7th ed.). See *Junk v. Terminix Intern. Co.*, 628 F.3d 439, 450, Prod. Liab. Rep. (CCH) P 18556 (8th Cir. 2010) (product liability action by a mother who alleged her son was severely injured when exposed to insecticides made by the defendants, held that an EPA report that "summarized" research on the effect of chemical exposure was not admissible under Fed. R. Evid. 803(8)(C) and could not be disclosed through a neonatologist and board certified pediatrician under Fed. R. Evid. 703 based on "trustworthiness" concerns, including a disclaimer in the report itself).

<sup>28</sup>For judicial notice, see Wis. Stats. § 889.01 (publication by state as evidence of laws).

<sup>29</sup>*Gentile v. County of Suffolk*, 129 F.R.D. 435, 449 (E.D. N.Y. 1990) judgment aff'd, 926 F.2d 142, 32 Fed. R. Evid. Serv. 315 (2d Cir. 1991) (by Weinstein, J.).

of trustworthiness in such statements.<sup>30</sup>

Traffic accident reports are in many ways the most familiar, almost archetypical investigative report. Specially trained accident investigators are invariably called to the scene of fatal accidents regardless of whether criminal conduct is suspected. Far more mundane traffic accidents are also investigated because of statutes requiring official notification. A standard traffic accident report embraces multiple sources of hearsay (e.g., the drivers, bystanders) and usually includes the officer's assessment of fault. Although many states admit such traffic accident reports under statutes identical to § 908.03(8)(C), Wisconsin specifically excludes their use "as evidence" in any "judicial trial, civil or criminal."<sup>31</sup> In sum, traffic accident reports generally fall within the orbit of investigative reports but are specifically excluded by statute.

The public records exception explicitly permits the introduction of opinions and conclusions—"factual findings"—contained in the authorized reports. The findings, again, may relate to a specific incident (e.g., an aircrash) or matters of more general concern, such as blood alcohol concentrations in human beings (see above). The Supreme Court addressed the scope of the "factual findings" language in *Beech Aircraft Corp. v. Rainey*,<sup>32</sup> a product liability action arising out of the crash of a Navy training aircraft. At trial the prime issue was whether the crash occurred because of the pilot's error or because the airplane itself was defective. The defendants attempted to introduce an investigative report concerning the crash prepared by the Judge Advocate General (JAG), pursuant to authority granted in the Manual of the Judge

<sup>30</sup>See *Estate of Kriefall v. Sizzler USA Franchise, Inc.*, 2011 WI App 101, ¶ 61, 335 Wis. 2d 151, 801 N.W.2d 781, 74 U.C.C. Rep. Serv. 2d 819 (Ct. App. 2011), decision aff'd, 2012 WI 70, 342 Wis. 2d 29, 816 N.W.2d 853, 77 U.C.C. Rep. Serv. 2d 1007 (2012) (civil litigation following a child's death caused by eating contaminated food; the court discussed findings made in a state investigative report into the "outbreak" which listed a number of serious violations; the court found that sufficient evidence supported the jury's findings while also observing, in dicta, that the report was admissible as an investigative report under § 908.03(8)(c) and that statements made by restaurant employees, incorporated into the report, were also admissible as admissions by party op-

ponents, § 908.01(4)(b)1, 3, or 4).

Fed. R. Evid. 803(8) was amended to clarify that the opponent has the burden of showing any lack of trustworthiness (see above).

<sup>31</sup>Wis. Stats. § 346.73. For cases from other jurisdiction, see, e.g., *Lubanski v. Coleco Industries, Inc.*, 929 F.2d 42, 45, Prod. Liab. Rep. (CCH) P 12784, 32 Fed. R. Evid. Serv. 1093 (1st Cir. 1991) (harmless error committed where the trial court excluded "pro forma" a state trooper's accident report); *Baker v. Elcana Homes Corp.*, 588 F.2d 551, 3 Fed. R. Evid. Serv. 1592 (6th Cir. 1978).

<sup>32</sup>*Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 109 S. Ct. 439, 102 L. Ed. 2d 445, 1989 A.M.C. 441, 26 Fed. R. Evid. Serv. 257 (1988).

Advocate General. Investigators spent six weeks preparing the "JAG Report." The report was divided into sections setting forth "finding of fact," "opinions," and "recommendations."<sup>33</sup> The trial court admitted the factual findings and some of the JAG Report's "opinions" about how the crash occurred, which supported the pilot error theory. A jury decided the case in favor of the defendants. The Eleventh Circuit reversed, concluding that Rule 803(8)(C) did not embrace evaluative conclusions. The United States Supreme Court reversed the Eleventh Circuit on this point. It observed that the Federal Rules of Evidence generally, and Fed. R. Evid. 803(8)(C) in particular, reject the proffered dichotomy between "fact" and "opinion."<sup>34</sup> Summarizing its conclusion, the Court stated:

We hold, therefore, that portions of investigatory reports otherwise admissible under Rule 803(8)(C) are not inadmissible merely because they state a conclusion or opinion. As long as the conclusion is based on a factual investigation and satisfies the Rule's trustworthiness requirement, it should be admissible along with other portions of the report. As the trial judge in this case determined that certain of the JAG Report's conclusions were trustworthy, he rightly allowed them to be admitted into evidence.<sup>35</sup>

The primary safeguards against abuse are in the rule's requirement that the report be based on a lawfully conducted factual investigation and the trial court's broad authority to exclude untrustworthy reports or portions of a report.<sup>36</sup> Moreover, the opponent is free to impeach the report's conclusions. Although the Court laid to rest the fact/opinion shibboleth, it reserved the question about the extent to which Rule 803(8)(C) allows for the admission of legal conclusions.<sup>37</sup>

Rainey also provided some guidance on the kinds of factors that the trial court should consider in determining whether a report is trustworthy. The Court set forth a nonexclusive list of four factors which bear upon the trustworthiness of the report:<sup>38</sup>

(1) The timeliness of the investigation;

<sup>33</sup>The JAG Report is described in more detail at *Beech Aircraft Corp. v. Rainey*, 109 S.Ct. 443-44.

<sup>34</sup>*Beech Aircraft Corp. v. Rainey*, 109 S. Ct. at 449.

<sup>35</sup>*Beech Aircraft Corp. v. Rainey*, 109 S. Ct. at 450.

<sup>36</sup>*Beech Aircraft Corp. v. Rainey*, 109 S. Ct. at 449.

<sup>37</sup>*Beech Aircraft Corp. v. Rainey*, 109 S. Ct. at 450 n.13.

<sup>38</sup>*Beech Aircraft Corp. v. Rainey*, 109 S. Ct. at 449 n.11. The Court

acknowledged that these four factors were originally described in the federal advisory committee's note to Rule 803(8). The fourth factor above refers to the kinds of "anticipation of litigation concerns" first articulated in *Palmer v. Hoffman*, 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645, 1943 A.M.C. 299, 144 A.L.R. 719 (1943). The Supreme Court also cited to Note, *The Trustworthiness of Government Evaluative Reports under Federal Rule of Evidence 803(8)(C)*, 96 Harv. L. Rev. 492 (1982). Finally, the Court stated:

In a case similar in many respects to

- (2) The investigator's skill or experience;
- (3) Whether a hearing was held; and
- (4) Possible bias when reports are prepared with a view to possible litigation.

A fifth factor for consideration is the finality of the investigative findings. To the extent that the findings are tentative or preliminary, the assumption of reliability is degraded and the court may consider exclusion.<sup>39</sup> Wisconsin case law is in accord.<sup>40</sup>

Given the complexities raised by these considerations, the admissibility of public records, especially investigative reports, should be challenged prior to trial and approached through an admissibility hearing which addresses these factors. The trial court may, in its discretion, limit the parties to reading excerpts from the report and preclude the jury from viewing the actual report.<sup>41</sup>

### § 908.03(9) RECORDS OF VITAL STATISTICS

The following are not excluded by the hearsay rule, even though

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this one, the trial court applied the trustworthiness requirement to hold inadmissible a JAG Report on the causes of a Navy airplane accident; it found the report untrustworthy because it "was prepared by an inexperienced investigator in a highly complex field of investigation." *Fraley v. Rockwell Intern. Corp.*, 470 F. Supp. 1264, 1267 (S.D. Ohio 1979). In the present case, the District Court found the JAG Report to be trustworthy. App. 35. As no party has challenged that finding, we have no occasion to express an opinion on it. *Id.*

<sup>39</sup> See *Gentile v. County of Suffolk*, 129 F.R.D. 435 (E.D. N.Y. 1990), judgment aff'd, 926 F.2d 142, 32 Fed. R. Evid. Serv. 315 (2d Cir. 1991) (Weinstein, J.) (thorough, scholarly opinion by Judge Jack Weinstein discussing the admissibility of 200 page report prepared by the State Investigation Committee that recorded the lax municipal standards regarding internal discipline in the police department; held that the report, in part, was relevant and admissible in plaintiff's civil rights action arising out of an incident of police brutality, even though the report did not focus on the particular incident).

<sup>40</sup> *Staskal v. Symons Corp.*, 2005 WI App 216, ¶¶ 17-21, 287 Wis. 2d 511, 706 N.W.2d 311, 203 Ed. Law Rep. 811 (Ct. App. 2005) (litigation arising out of a construction site accident that left a worker seriously injured; held that trial court properly excluded, upon plaintiff's motion, an OSHA report that placed most of the fault on plaintiff's employer and not the third-party manufacturer of a concrete forming system which was the main target of plaintiff's lawsuit; the OSHA report and documents relating to the employer's eventual settlement failed to qualify under § 908.03(8) for multiple reasons, including (1) the absence of any hearing by OSHA investigators, (2) an important unexplained "factual mistake" in the OSHA report, and (3) the "uncertainty raised by the settlement agreement" and whether it raised "questions about the reliability of conclusions in the report"; these same factors justified the OSHA report's exclusion under § 904.03).

<sup>41</sup> *Gentile v. County of Suffolk*, 129 F.R.D. at 458 ("Courts may review and edit portions of such reports; the edited portions retain the assumption of reliability accorded the government investigation as a whole.").

the declarant is available as a witness:

**(9) Records of vital statistics.** Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

### AUTHOR'S COMMENTS

#### § 803.9 Records of vital statistics

#### § 803.9 Records of vital statistics

The hearsay exception for vital statistics is a special category of public records that supplements Wis. Stats. § 908.03(8). It is limited to records of births, fetal deaths, deaths, or marriages. The general provisions governing "vital statistics" are collected in Wis. Stats. ch. 69 ("collection of statistics"). In short, Wis. Stats. § 908.03(9) must be interpreted in conjunction with the statutes creating the duty to record the vital statistics.<sup>1</sup> The Wisconsin rule is substantively similar to Fed. R. Evid. 803(9).<sup>2</sup>

The vital statistics exception is justified by the general trustworthiness of this kind of information, much of which is mundane and non-controversial, at least at the time it was recorded. Moreover, the reporting requirement itself creates both a pattern of regularity and a corresponding duty that further enhances the records' reliability. Inaccuracies and mistakes are usually susceptible to correction in accordance with statutory procedures.<sup>3</sup> Finally, considerable time usually elapses before the underlying event becomes the subject of litigation, and the record may be the most convenient and reliable evidence, especially if it was created prior to the motive to litigate.

From this it follows that the exception for vital statistics is only as broad as the underlying statute that requires the reporting of the information.<sup>4</sup> The person who makes the report need not be a public officer. A report of a birth or a death is usually

#### [Section 803.9]

<sup>1</sup>See Fed. R. Evid. 803(9) advisory committee's note ("Records of vital statistics are commonly the subject of particular statutes making them admissible in evidence.").

<sup>2</sup>The Judicial Council Committee's Note indicated only that "[t]his exception is consistent with [Wis. Stats. § 891.09(1)]." Wis. Stats. § 891.09(1) governs records of "marriage, birth, stillbirth, fetal death, or

death."

<sup>3</sup>See *Matter of Sullivan*, 218 Wis. 2d 458, 578 N.W.2d 596 (1998), discussing the statutory procedures for correcting death certificates.

<sup>4</sup>See *Neuman v. Circuit Court*, 231 Wis. 2d 440, ¶ 8, 605 N.W.2d 280 (Ct. App. 1999) (statute authorizing death certificates "limited the amount of information required on a death certificate to the cause of death and the evolution of the disease").

made to, or by, a professional (e.g., a doctor) who has no motive to inaccurately record the information.

Finally, although Wis. Stats. § 908.03(9) creates only a hearsay exception, many of these records are given presumptive force by other statutes.<sup>5</sup>

### § 908.03(10) ABSENCE OF PUBLIC RECORD OR ENTRY

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

\*\*\*

**(10) Absence of public record or entry.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Wis. Stats. § 909.02, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

### AUTHOR'S COMMENTS

§ 803.10 Absence of public record or entry

#### § 803.10 Absence of public record or entry

Wis. Stats. § 908.03(10) concerns the absence of hearsay and is best understood as a rule of circumstantial evidence.<sup>1</sup> It permits a negative inference from the fact that a public record of an event does not exist. This exception applies even where the absence of the record (or entry) is the central issue in the litigation.<sup>2</sup> It is kith-and-kin with Wis. Stats. § 908.03(7), which governs the absence of entries in records of regularly conducted activities. It is substantively similar to Fed. R. Evid. 803(10), although the federal rule requires that in criminal cases the prosecutor must provide pretrial notice.<sup>3</sup>

The foundation is straightforward. First, it must be shown that

<sup>5</sup>See Wis. Stats. § 891.09 ("presumptive evidence") and the Judicial Council's note, quoted above.

#### [Section 803.10]

<sup>1</sup>Wis. Stats. § 908.03(10) Judicial Council Committee's Note ("Technically it is not a hearsay exception but circumstantial evidence. Nonetheless it seems conveniently appropriate.").

<sup>2</sup>Fed. R. Evid. 803(10) advisory committee's note ("The rule includes

situations in which absence of a record may itself be the ultimate focal point of inquiry, e.g. *People v. Love*, 310 Ill. 558, 142 N.E. 204 (1923), certificate of Secretary of State admitted to show failure to file documents required by Securities Law, as well as cases where the absence of a record is offered as proof of the nonoccurrence of an event ordinarily recorded.").

<sup>3</sup>Fed. R. Evid. 803(10) provides:  
(10) Absence of a Public Record.

a record, report, or statement of some type is regularly made and preserved by a public office or agency. This is most easily accomplished by establishing the organization's routine practice, as permitted by Wis. Stats. § 904.06.<sup>4</sup> The court may also judicially notice statutes and regulations mandating such duties. Second, the evidence must demonstrate that a "diligent search failed" to disclose the report, record, or entry. The two foundational elements permit the inferences that the record itself is absent or that a matter did not occur or does not exist.

The foundation may be established by testimony or by a certificate that complies with the self-authentication requirements of Wis. Stats. § 909.02(2).<sup>5</sup> In this respect the rule differs from the public records exception, Wis. Stats. § 908.03(8), which does not require testimony by a custodial witness.

### § 908.03(11) RECORDS OF RELIGIOUS ORGANIZATIONS

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

\* \* \*

**(11) Records of religious organizations.** Statements of birth, marriages, divorces, deaths, whether a child is marital or nonmarital, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

### AUTHOR'S COMMENTS

#### § 803.11 Records of religious organizations

#### § 803.11 Records of religious organizations

The records of a religious organization are excepted from the hearsay rule when offered to prove births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage,

Testimony—or certification under Rule 902—that a diligent search failed to disclose a public record or statement if:

(A) the testimony or certification is admitted to prove that

(i) the record or statement does not exist; or

(ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the no-

tice—unless the court sets a different time for the notice or the objection.

<sup>4</sup>See § 406.3.

<sup>5</sup>Nelson v. Zeimetz, 150 Wis. 2d 785, 800, 442 N.W.2d 530, 536 (Ct. App. 1989) ("In the case before us, neither a certificate under seal exists nor direct testimony regarding a diligent search. As such, the third part of the letter, regarding the lack of a response from Protective, does not fall within the statutory exception for hearsay.").

or other similar facts of personal or family history. Wis. Stats. § 908.03(11) is substantially identical to Fed. R. Evid. 803(11). The religious records exception should be considered along with Wis. Stats. § 891.09, which gives many of these records presumptive force.<sup>1</sup>

The record must be one that is regularly kept by the religious organization. The record's reliability arises both from the routine nature of record keeping as well as the assumed integrity of declarants who prepare them. The information reflected in the record may be reported by persons outside the formal religious organization. This differs from the requirements relating to records of a regularly conducted activity under Wis. Stats. § 908.03(6), yet the departure is justified by the relatively low probability that the information in such records is fabricated.<sup>2</sup>

Wis. Stats. § 908.03(11) does not define "religious organization." Its application will depend upon the facts of the particular case.

Regardless of its hearsay status, the religious organization's records must be authenticated. This ordinarily requires testimony by someone within the religious organization with knowledge of the record keeping procedures, even though the person may lack personal knowledge relating to the particular record. The routine record-keeping practices may be established through Wis. Stats. § 904.06, which governs proof of an organization's routine practices.<sup>3</sup>

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**[Section 803.11]**

<sup>1</sup>See Wis. Stats. § 891.09(2) ("church records" relating to births, etc.). See also the Judicial Council Committee's Note to Wis. Stats. § 908.03(11):

This exception is broader in admitting the records of religious organizations than [Wis. Stats. § 891.09(2)]. However, the latter section affects the weight of the evidence by making the record *prima facie* evidence of the facts contained in the record. To obtain the benefit of such weight under that statute, the record must be produced by its proper custodian who under oath attests the genuineness of the document. Admissibility will be broader under this exception but it will require authentication pursuant to [Wis. Stats. § 909.01] in the same fashion as [Wis. Stats. § 891.09(2)]. To the extent that this subdivision is broader, the document will only be admissible but where overlapped by [Wis. Stats. § 891.09(2)] the sufficiency of the evidence will be

established by that subdivision. No change in [Wis. Stats. § 891.09(2)] is required.

<sup>2</sup>Fed. R. Evid. 803(11) advisory committee's note ("both the business record doctrine and Exception (6) require that the person furnishing the information be one in the business or activity. The result is such decisions as *Dailey v. Grand Lodge, Brotherhood of Railroad Trainmen*, 311 Ill. 184, 142 N.E. 478 (1924), holding a church record admissible to prove fact, date and place of baptism, but not age of child except that he had at least been born at the time. In view of the unlikelihood that false information would be furnished on occasions of this kind, the rule contains no requirement that the informant be in the course of the activity").

<sup>3</sup>See § 406.3.

**§ 908.03(12) MARRIAGE, BAPTISMAL, AND SIMILAR CERTIFICATES**

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

\* \* \*

**(12) Marriage, baptismal, and similar certificates.** Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

**AUTHOR'S COMMENTS**

§ 803.12 Marriage, baptismal, and similar certificates

**§ 803.12 Marriage, baptismal, and similar certificates**

This hearsay exception applies to statements of fact contained in a certificate showing that the certificate's maker performed a marriage, administered a sacrament, or performed some other ceremony. The kinds of ceremonies and sacraments covered by this rule will depend upon the tenets of the particular religious organization as well as applicable statutes. It is substantively identical to Fed. R. Evid. 803(12).

The rule does not limit the scope of the subject matter, except to the extent that it also mandates that the maker of the certificate (i.e., the declarant) must have been a member of the clergy, a public official, or other person authorized by the rules or practices of a religious organization, or by law, to perform the act certified. This presents a preliminary question of fact to be determined by the trial court.<sup>1</sup> The authority of public officials to perform such acts is normally subject to judicial notice of applicable statutes or rules. The practices of religious organizations must be established by the testimony of lay witnesses with personal knowledge or qualified experts.

Wis. Stats. § 908.03(12) also contains a timing element. The certificate must "purport" to have been issued at the time of the act or within a reasonable time thereafter. The date on the certificate is adequate proof of when it was made relative to the event recorded in the document.<sup>2</sup>

Where a public official performs the ceremony, this exception

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**[Section 803.12]**

<sup>1</sup>See § 104.1.

<sup>2</sup>Fed. R. Evid. 803(12) advisory

committee's note ("When the person executing the certificate is not a public official, the self-authenticating charac-

overlaps with other public records exceptions.<sup>3</sup> Certificates issued by public officials may be self-authenticating.<sup>4</sup> To Certificates made by those who are not public officials are authenticated by testimony that the maker was duly authorized and actually made the certificate. The authenticating witness need not have personal knowledge of the events described in the certificate or its making.

### § 908.03(13) FAMILY RECORDS

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

\* \* \*

**(13) Family records.** Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

### AUTHOR'S COMMENTS

#### § 803.13 Family records

#### § 803.13 Family records

The family records exception contained in Wis. Stats. § 908.03(13) may be used to prove facts relating to "personal or family history." The latter phrase should be construed in a manner consistent with other similar rules, including Wis. Stats. § 908.03(11), which applies to statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or mar-

ter of documents purporting to emanate from public officials, see Rule 902, is lacking and proof is required that the person was authorized and did make the certificate. The time element, however, may safely be taken as supplied by the certificate, once authority and authenticity are established, particularly in view of the presumption that a document was executed on the date it bears.").

See § 901.1.

<sup>3</sup>Fed. R. Evid. 803(12) advisory committee's note ("The principle of proof by certification is recognized as to public officials in Exceptions (8) and (10), and with respect to authentication in Rule 902. The present exception

is a duplication to the extent that it deals with a certificate by a public official, as in the case of a judge who performs a marriage ceremony. The area covered by the rule is, however, substantially larger and extends the certification procedure to clergymen and the like who perform marriages and other ceremonies or administer sacraments. Thus certificates of such matters as baptisms or confirmation, as well as marriage, are included.").

<sup>4</sup>Wis. Stats. § 908.03(12) Judicial Council Committee's Note ("However, under this subdivision if the certificate is executed by a public official, the certificate is self-authenticated pursuant to Wis. Stats. § 909.02.").

riage, or other similar facts of personal or family history.<sup>1</sup> The record must, of course, be authenticated.<sup>2</sup>

The family records exception encompasses a broad variety of sources. Without limitation, it extends to statements contained in family Bibles, genealogies, charts, engravings on rings, tombstones or urns, inscriptions on family portraits, and "the like." The rule's breadth is justified by the small likelihood that such sources of information are inaccurate or fabricated. Most such records will have been created long before the underlying dispute arose.

If analyzed closely, most of these sources embrace multiple levels of hearsay. Nothing on the face of the rule restricts its use to single layers of hearsay. Indeed, some of the sources mentioned in the rule undoubtedly contemplate multiple layers. Inscriptions on rings or tombstones are made by craftsmen who engrave information related by other, presumably knowledgeable declarants. Absent compelling proof of fabrication, the evidence is deemed sufficiently reliable for hearsay purpose. The rule accords with the common law.<sup>3</sup>

#### § 908.03(14) RECORDS OF DOCUMENTS AFFECTING AN INTEREST IN PROPERTY

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

\* \* \*

**(14) Records of documents affecting an interest in property.** The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorized the recording of documents of that kind in that office.

#### [Section 803.13]

<sup>1</sup>See Wis. Stats. §§ 803.19 (reputation concerning personal or family history), 803.23 (civil judgments as to personal and family history), and 804.5 and 804.5m (statements regarding personal or family history). The Wisconsin rule is substantively identical to Fed. R. Evid. 803(13). Congress approved of Fed. R. Evid. 803(13) in the form submitted by the Supreme Court, but the House Judiciary Committee Report stated:

The Committee approved this Rule in the form submitted by the Court, in-

tending the phrase "Statements of fact concerning personal or family history" be read to include the specific types of such statements enumerated in Rule 803(11).

Current Fed. R. Evid. 803(13) was revised for style in 2011 but was not changed substantively.

<sup>2</sup>Wis. Stats. § 908.03(13) Judicial Council Committee's Note. See § 901.1.

<sup>3</sup>Wis. Stats. § 908.03(13) Judicial Council Committee's Note ("The provision is in accord with the current common law.").

**AUTHOR'S COMMENTS****§ 803.14 Records of documents affecting an interest in property****§ 803.14 Records of documents affecting an interest in property**

The rule of Wis. Stats. § 908.03(14) applies to records purportedly establishing or affecting an interest in property. More precisely, the record establishes that some other document was duly recorded by a public office. The record may be used as proof not only of the document's content but also its execution and delivery by each person by whom it purports to have been executed. The execution and delivery elements endow this rule with broader coverage than that provided for public records generally under Wis. Stats. § 908.03(8). Normally, facts pertaining to execution and delivery are beyond the personal knowledge of the recorder of the document.<sup>1</sup> The rule is substantively identical to Fed. R. Evid. 803(14).

The reach of this exception is limited to those records that are authorized by statute to be filed in an appropriate public office.<sup>2</sup> Put differently, Wis. Stats. § 908.03(14) is a conduit for records governed by other filing statutes. It also overlaps with other

**[Section 803.14]**

<sup>1</sup>Fed. R. Evid. 803(14) advisory committee's note:

The recording of title documents is a purely statutory development. Under any theory of the admissibility of public records, the records would be receivable as evidence of the contents of the recorded document, else the recording process would be reduced to a nullity. When, however, the record is offered for the further purpose of proving execution and delivery, a problem of lack of first-hand knowledge by the recorder, not present as to contents, is presented. This problem is solved, seemingly in all jurisdictions, by qualifying for recording only those documents shown by a specified procedure, either acknowledgement or a form of probate, to have been executed and delivered.

See also Wis. Stats. § 908.03(14) Judicial Council Committee's Note ("Contents of the document as well as delivery and execution are proved by the record of the document; such a result is consistent with the provisions

of recording statutes that require attesting witnesses and acknowledgement before an authorized official to entitle a document to recording.").

<sup>2</sup>Wis. Stats. § 908.03(14) Judicial Council Committee's Note ("This provision is consistent with Wisconsin statutes, parts of which are duplicated in this provision, [Wis. Stats. §§ 889.07, 889.15, 889.17, 889.18, 889.19, 891.03, 891.04, 891.05, 891.06, 891.07, 891.11, 891.12, 891.14, 891.16, and 891.36]. . . . This provision should be read as supplementing other statutes which may have lesser or greater effects that address themselves to authentication or original writing rules on one hand, or the sufficiency or conclusiveness of the evidence on the other hand. *Shellow v. Hagen*, 9 Wis. 2d 506, 516, 101 N.W.2d 694, 699 (1960) applied not only the original writings rule but also Uniform Rule 63(19) which is substantially the same exception to the hearsay rule.").

statutory provisions.<sup>3</sup> For example, Wis. Stats. § 889.17 provides for the admissibility of "[e]very instrument entitled by law to be recorded or filed in the office of a register of deeds."<sup>4</sup> The identity of the public office is controlled entirely by the underlying statute which authorizes the recording. Nothing in Wis. Stat. § 908.03(14) indicates that it is limited to records that are required to be filed. Statutory authorization is all that is necessary.

### § 908.03(15) STATEMENTS IN DOCUMENTS AFFECTING AN INTEREST IN PROPERTY

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

**(15) Statements in documents affecting an interest in property.** A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealing with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

### AUTHOR'S COMMENTS

§ 803.15 Statements in documents affecting an interest in property

### § 803.15 Statements in documents affecting an interest in property

Closely related to Wis. Stats. § 908.03(14) (records of documents affecting an interest in property), the hearsay exception of Wis. Stats. § 908.03(15) extends to documents other than those authorized or required to be filed in a public office. It is an outgrowth of the common-law exception for ancient documents and dispenses with the requirement that the document be "ancient" (more than 20 years old) or that the declarant be unavailable.<sup>1</sup> It is substantively identical to Fed. R. Evid. 803(15).

The exception embraces statements in documents that purport

<sup>3</sup>Some examples are given in the Judicial Council's note, quoted above. See e.g., Wis. Stats. §§ 409.312 (UCC filing requirements); 889.24 (conveyances, how proved).

<sup>4</sup>Proof may be made by the record itself or a certified copy.

#### [Section 803.15]

<sup>1</sup>Wis. Stats. § 908.03(15) Judicial Council Committee's Note ("This provision is a specific illustration of the

original common law ancient document rule. See [Wis. Stats. § 908.03(16)]. The common law rule is changed by elimination of the requirement that the document be ancient or the declarant unavailable, or that the dealings with the property are consistent with the statement. If there is proof of dealings inconsistent with the statement, the statement is not admissible under this rule. By eliminating the time and availability require-

to establish or affect an interest in property. The rule does not distinguish between real or personal property. The statement of fact must be relevant to the purpose of the document. For example, the document may contain statements evidencing delivery or creating a power of attorney in connection with the transaction.<sup>2</sup> The document need only affect a property interest; it need not be dispositive. Many documents admissible under this exception may also be admissible under the verbal acts doctrine as well, at least when they create (or remove) property rights. (See § 801.3.)

The hearsay exception is inapplicable to such statements where it is shown that dealings with the property after the document was made were inconsistent with the truth of the statements or the "purport" of the document. The opponent bears the burden of showing the inconsistent dealings for two reasons. First, this furthers the purpose behind Wis. Stats. § 908.03(15), which deleted the common-law requirement that the *proponent* demonstrate dealings that were *consistent* with the statement.<sup>3</sup> Second, this arrangement obviates the practical difficulties of requiring the proponent to prove a negative. The opponent is naturally motivated to unearth such evidence if it exists.

#### § 908.03(16) STATEMENTS IN ANCIENT DOCUMENTS

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

\* \* \*

**(16) Statements in ancient documents.** Statements in a document in existence 20 years or more whose authenticity is established.

#### AUTHOR'S COMMENTS

##### § 803.16 Statements in ancient documents

ments, the statement in the document as well as the testimony of the declarant or other witnesses may now be received in evidence.").

<sup>2</sup>Fed. R. Evid. 804(15) advisory committee note:

Dispositive documents often contain recitals of fact. Thus a deed purporting to have been executed by an attorney in fact may recite the existence of the power of attorney, or a deed may recite that the grantors are all the heirs of the last record owner. Under the rule, these recitals are exempted from the hearsay rule. The circumstances under

which dispositive documents are executed and the requirement that the recital be germane to the purpose of the document are believed to be adequate guarantees of trustworthiness, particularly in view of the nonapplicability of the rule if dealings with the property have been inconsistent with the document. The age of the document is of no significance, though in practical application the document will most often be an ancient one.

<sup>3</sup>See the Judicial Council's note, quoted above.

### § 803.16 Statements in ancient documents

The tersely stated rule of Wis. Stats. § 908.03(16) excepts from the hearsay rule statements in documents that are 20 or more years old. It is justified by necessity.<sup>1</sup> There are no restrictions on the statements' subject matter, which is best addressed as a relevancy issue. Nor must the document assume any particular form. Ancient documents may consist of letters, newspapers, or diary entries. Depending upon the circumstances, the ancient documents exception may overlap with the family records exception,<sup>2</sup> the exceptions for records and documents affecting an interest in property,<sup>3</sup> and public records.<sup>4</sup> The present rule represented a change in Wisconsin law by reducing the time period from 30 to 20 years.<sup>5</sup> It is substantively identical to Fed. R. Evid. 803(16), which is currently in flux (see below).

The policy behind the rule is obvious and unremarkable. Documents prepared more than twenty years earlier were most likely made long before the dispute in question arose and before any motive to fabricate would have arisen. Its written form substantially reduces the risk of any error in transmission. Finally, it is unlikely that a declarant with personal knowledge will be available to testify or can provide more reliable information than the venerable document itself. The hearsay declarant, known or unknown, may be impeached as provided by the rules discussed in § 806.1.

The ancient records exception (like other hearsay exceptions) is largely an exercise in authentication.<sup>6</sup> The Judicial Council advised that the rule's explicit reference to authentication was a

#### [Section 803.16]

<sup>1</sup>See McCormick on Evidence § 323 (7th ed.).

<sup>2</sup>See § 803.13.

<sup>3</sup>See §§ 803.14, 803.15.

<sup>4</sup>See § 803.8.

<sup>5</sup>Judicial Council Committee's Note to Wis. Stats. § 908.03(16).

<sup>6</sup>See the Fed. R. Evid. 803(16) advisory committee's note, which discusses the interrelationship of the hearsay and authentication issues that arise with regard to this exception:

Authenticating a document as ancient, essentially in the pattern of the common law, as provided in [Fed. R. Evid. 901(b)(8)], leaves open as a separate question the admissibility of assertive statements contained therein as against a hearsay objection. 7 Wigmore

Sec. 2145a. Wigmore further states that the ancient document technique of authentication is universally conceded to apply to all sorts of documents, including letters, records, contracts, maps and certificates, in addition to title documents, citing numerous decisions. *Id.* Sec. 2145. Since most of these items are significant evidentially only insofar as they are assertive, their admission in evidence must be as a hearsay exception. But see 5 *id.* Sec. 1573, p. 429, referring to recitals in ancient deeds as a "limited" hearsay exception. The former position is believed to be the correct one in reason and authority. As pointed out in McCormick Sec. 298, danger of mistake is minimized by authentication requirements, and age affords assurance that the writing antedates the present controversy. See *Dallas County v. Commercial Union Assur. Co.*, 286 F.2d 388 (5th Cir. 1961), upholding admissibility of 58-

“reminder” of the additional requirements of Wis. Stats. § 909.015(8), relating to authentication of ancient documents.<sup>7</sup> That section provides:

(8) Ancient documents or data compilations. Evidence that a document or data compilation, in any form, (a) is in such condition as to create no suspicion concerning its authenticity, (b) was in a place where it, if authentic, would likely be, and (c) has been in existence 20 years or more at the time it is offered.

Nothing restricts the method of authentication to Wis. Stats. § 909.015(8). For example, the exhibit may be authenticated and dated by the testimony of a properly qualified document examiner.

When documents and records were synonymous with hard-copies, the rule presented few problems beyond determining its age and content. Internet archives and other electronic means of discovering and preserving documents and records has created perplexing problems that involve not just hearsay but authentication and the original writings rule. The Advisory Committee proposed abrogating Fed. R. Evid. 803(16) entirely because of the great risk posed by unreliable documents plucked from the internet but settled on a proposed amendment to the rule which

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year-old newspaper story.

<sup>7</sup>See *Horak v. Building Services Industrial Sales Co.*, 2012 WI App 54, ¶ 12, ¶¶ 14-15, 341 Wis. 2d 403, 815 N.W.2d 400 (Ct. App. 2012) (in action against supplier of asbestos products, held that various invoices were admissible under the “ancient-documents exception” to the hearsay rule, having met the foundational requirements of Wis. Stat. §§ 908.03(16) and 909.015(8); their location “in possession of a business’s attorney are in a place where, if authentic, they are likely to be” and their condition “suggests their authenticity”; that 38,000 pages of documents appeared to have been “randomly preserved and no living person can verify their authenticity” went to weight, not admissibility under § 909.01). *George v. Celotex Corp.*, 914 F.2d 26, Prod. Liab. Rep. (CCH) P 12644, 31 Fed. R. Evid. Serv. 30 (2d Cir. 1990), where the court held admissible a report written in 1947 known as the “Hemeon Report,” which related the danger of asbestos to those who worked with it. The court said:

The document has been in existence

more than twenty years and its authenticity was established at trial as contemplated by the rule. Its authenticity was established in accordance with [Fed. R. Evid. 901(b)(8)]. Indeed, defendant does not dispute that plaintiff met these requisites for admitting the Hemeon Report as an ancient document. Rather Celotex argues that the need to test the reliability of the report’s conclusions makes it inadmissible as an ancient document. Defendant cites neither case-law nor commentary in support of its argument, nor could we find any that limit the scope and application of the ancient documents exception to the hearsay rule in the manner suggested by the defendant.

914 F.2d at 30 (note omitted).

The interplay of the hearsay exception and the authentication rules for ancient documents is discussed in *Threadgill v. Armstrong World Industries, Inc.*, 928 F.2d 1366, Prod. Liab. Rep. (CCH) P 12828, 32 Fed. R. Evid. Serv. 699 (3d Cir. 1991) (“Once a document qualifies as an ancient document, it is automatically excepted from the hearsay rules under [Fed. R. Evid. 803(16)].”) (notes omitted).

limits it to documents "prepared before January 1, 1998."<sup>8</sup> Under the current Wisconsin rule, such concerns may be addressed through § 904.03.

### § 908.03(17) MARKET REPORTS, COMMERCIAL PUBLICATIONS

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

\* \* \*

**(17) Market reports, commercial publications.** Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

### AUTHOR'S COMMENTS

#### § 803.17 Market reports, commercial publications

Most of us seldom pause to question the accuracy of a stock's closing value, for example, appearing in a daily newspaper or, more likely, a website for a reputable news source. Wis. Stats. § 908.03(17) provides an exception for "published compilations" that are generally relied upon by the public or by persons in particular occupations. The rule is substantively identical to Fed. R. Evid. 803(17).

General use and reliance by the public or occupations is a preliminary question of fact for the judge to determine under Wis. Stats. § 901.04(1). The public's general reliance on the publication is likely within the realm of the trial judge's life experiences. Thus, testimony on this point seems unnecessary, yet where professed in no way binds the trial judge. Reliance on the publication in a particular profession will likely require expert testimony.

Examples are market closings, tabulations, lists, and directories. Stock prices on a given day may be established by bringing in a newspaper hardcopy listing the closing values for the pertinent date or a printout from an online source, properly

<sup>8</sup>The Advisory Committee's proposal was transmitted to the Supreme Court for its consideration in late 2016. The Advisory Committee's concerns are rooted in the risk that the rule "will be used as a vehicle to admit vast amounts of unreliable electroni-

cally stored information." Other rules, such as Rule 803(6) (records of regularly conducted activities) or party admissions, may provide avenues of admissibility. Proposed amendment to Fed. R. Evid. 803(16) advisory committee's note.

authenticated of course.<sup>1</sup>

Traditionally the publication is in a written, "hardcopy" format.<sup>2</sup> There is, however, no reason to treat differently the same information obtained from a website, provided the other elements of the rule are satisfied, the evidence is properly authenticated, and the original writings rule is fulfilled.<sup>3</sup>

The rule is amply justified on grounds of reliability and necessity. The declarants' motivation for accuracy is exceptionally high because they seek to induce reliance on the compilation. And general reliance by the public or an occupation is a further mark of the material's reliability. Finally, the published compilation is usually the least expensive and most efficacious method of proving these facts.

Most hearsay admitted under this exception will have an authoritative cast, given the nature of the evidence. Nonetheless, Wis. Stats. § 908.03(17) is only a hearsay exception; it does not create a presumption of reliability.<sup>4</sup> The trier of fact is free to give the published compilation whatever weight it deems

### [Section 803.17]

<sup>1</sup>Fed. R. Evid. 803(17) advisory committee's note:

Ample authority at common law supported the admission in evidence of items falling in this category. While Wigmore's text is narrowly oriented to lists, etc., prepared for the use of a trade or profession, 6 Wigmore Sec. 1702, authorities are cited which include other kinds of publications, for example, newspaper market reports, telephone directories, and city directories. *Id.* §§ 1702–1706. The basis of trustworthiness is general reliance by the public or by a particular segment of it, and the motivation of the compiler to foster reliance by being accurate.

See *U.S. v. Mount*, 896 F.2d 612, 29 Fed. R. Evid. Serv. 1026 (1st Cir. 1990) (defendant convicted of attempting to sell stolen historical documents signed by President Lincoln; trial court properly admitted 2 volumes of a multi-volume work listing the owners of the collected works of Abraham Lincoln).

<sup>2</sup>McCormick on Evidence § 321 (7th ed.) (providing examples). See *U.S. v. Norman*, 415 F.3d 466 (5th Cir. 2005) (trial court properly barred cross-examination of government agents

with a DOJ manual on eyewitness identification proffered for purposes of showing that the agents did not follow proper identification protocol; the defense proffered no expert of its own, the agents did not recognize the author and were not themselves testifying as experts, and the trial judge did not take judicial notice of the manual's reliability).

<sup>3</sup>*U.S. v. Woods*, 321 F.3d 361, 60 Fed. R. Evid. Serv. 561 (3d Cir. 2003) (computerized data base prepared by the NCIB was properly used to present testimony about a VIN).

<sup>4</sup>See *Milwaukee Valve Co., Inc. v. Mishawaka Brass Mfg., Inc.*, 107 Wis. 2d 164, 175, 319 N.W.2d 885, 890, 34 U.C.C. Rep. Serv. 15 (Ct. App. 1982), where the trial court precluded a corporation president from testifying about the value of a kind of ingot. The court of appeals found no error, but noted in passing that the witness testified "that no resort could be had to prices published in trade journals because fair market value was nothing other than the price that could be obtained on the date in question." The court then observed: "Such a contention is expressly contrary to [Wis. Stats. § 908.03(17)]." The court's crypt-

appropriate. In some instances, however, the published compilation may meet the rigorous standards for judicial notice of fact as set forth in Wis. Stats. § 902.01. In civil cases, judicially noticed facts are dispositive; the jury must accept them as true.<sup>5</sup>

Opinion polls may fall within this exception, but they must have been part of a published compilation that is "generally used and relied upon" either by the general public or by persons of particular occupation.<sup>6</sup> Polls prepared for litigation purposes do not satisfy this requirement, and may also be excluded under Wis. Stats. § 904.03.<sup>7</sup> Some polls may be used solely as a basis for expert opinion under Wis. Stats. § 907.03.<sup>8</sup>

### § 908.03(18) LEARNED TREATISES

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

\* \* \*

**(18) Learned treatises.** A published treatise, periodical or pamphlet on a subject of history, science or art is admissible a tending to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the writer of the statement in the treatise, periodical or pamphlet is recognized in his profession or calling as an expert in the subject.

(a) No published treatise, periodical or pamphlet constituting a reliable authority on a subject of history, science or art may be received in evidence, except for impeachment on cross examination, unless the party proposing to offer such document in evidence serves notice in writing upon opposing counsel

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tic remark should not be interpreted as suggesting that published compilations somehow trump a witness's testimony. Rather, the court simply observed that the excluded testimony was itself mistaken.

<sup>5</sup>See § 201.2.

<sup>6</sup>Wis. Stats. § 908.03(17) Judicial Council Committee's Note:

The major question posed by this provision is whether opinion polls are admissible by virtue of it. Wisconsin cases have admitted opinion poll evidence when the method of poll taking provided assurance of trustworthiness, *State v. Kramer*, 45 Wis. 2d 20, 27, 171 N.W.2d 919, 922 (1969), and have rejected it when the method of assessing opinion or fact was not trustworthy, *Rohloff v. Aid Ass'n for Lutherans in Wisconsin and Other States*, 130 Wis.

61, 71, 109 N.W. 989, 992 (1906); *State ex rel. Leonard v. Rosenthal*, 123 Wis. 442, 447, 102 N.W. 49, 50 (1905). Opinion polls taken before or after the commencement of litigation probably require more assurances of trustworthiness than those that are "used and relied upon by the public or by persons in particular occupations" and that distinction seems to be the basis for the quoted limitation. This provision would seem to permit the use of opinion polls of the kind indicated to prove a fact; note that the state of mind exception, [Wis. Stats. § 908.03(3)], may also make an opinion poll admissible.

<sup>7</sup>Wis. Stats. § 908.03(17) Judicial Council Committee's Note (see above)

<sup>8</sup>See § 702.6042.

at least 40 days before trial. The notice shall fully describe the document which the party proposes to offer, giving the name of such document, the name of the author, the date of publication, the name of the publisher, and specifically designating the portion thereof to be offered. The offering party shall deliver with the notice a copy of the document or of the portion thereof to be offered.

(b) No rebutting published treatise, periodical or pamphlet constituting a reliable authority on a subject of history, science or art shall be received in evidence unless the party proposing to offer the same shall, not later than 20 days after service of the notice described in par. (a), serve notice similar to that provided in par. (a) upon counsel who has served the original notice. He shall deliver with the notice a copy of the document or of the portion thereof to be offered.

(c) The court may, for cause shown prior to or at the trial, relieve the party from the requirements of this section in order to prevent a manifest injustice.

#### AUTHOR'S COMMENTS

##### § 803.18 Learned treatises

##### § 803.18 Learned treatises

Statements in books, articles, and treatises are hearsay if offered to prove the truth of the matter asserted. They nevertheless carry substantial indicia of reliability. Their authors are often highly qualified "experts," publication exposes the work to peer review and criticism which in turn motivates the authors to be careful and accurate, and the treatise almost always predates litigation and is thus devoid of bias regarding the particular case. Following the modern trend, Wisconsin permits the liberal use of learned treatises.<sup>1</sup>

The Wisconsin rule stated in Wis. Stats. § 908.03(18) is substantially different from Fed. R. Evid. 803(18).<sup>2</sup> The federal rule requires that the learned treatise be introduced through the medium of an expert witness, who serves as its "chaperon" or

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##### [Section 803.18]

<sup>1</sup>McCormick on Evidence § 321 (7th ed.).

<sup>2</sup>Current Fed. R. Evid. 803(18) states:

(18) **Statements in Learned Treatises, Periodicals, or Pamphlets.** A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on

cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

"sponsor." Put differently, the federal practice contemplates the treatise's introduction during the direct or cross-examination of an expert, who reads the selected passages into the record.<sup>3</sup> Thus, it necessarily precludes any possibility that the treatise will be sent to the jury room as an exhibit. (It also has the collateral effect of drastically editing what counsel elects to offer as evidence. Juries will take unkindly to lawyers who have experts indiscriminately read long passages from a dry, technical work on a subject about which a lay jury knows (or cares) little.)

Unlike the federal rule, the Wisconsin rule does not require the "sponsorship" of an expert witness. It is still necessary, however, to prove that the treatise's author is an expert on the subject.<sup>4</sup> This presents a preliminary question of admissibility for the trial judge in accordance with Wis. Stats. § 901.04(1). The author's expertise may be shown in a variety of ways. First, the judge may take judicial notice of the author's qualifications as provided by Wis. Stats. § 902.01.<sup>5</sup> Second, because the rules of evidence are inapplicable to preliminary questions under Wis. Stats. § 901.04(1), the judge may rely on the hearsay itself. For example, a treatise may include a page outlining the author's impressive credentials upon which the judge may find sufficient specialized knowledge. Third, expert witnesses may testify about the author's credentials on direct or cross-examination. Generally, expert witnesses will be sufficiently familiar with the content of the work and the writer's qualifications and reputation to illuminate the issue. The "expertness" of the writer is judged in light of the

<sup>3</sup>McCormick on Evidence § 321 (7th ed.) observing that under Fed. R. Evid. 803(18) "the publication must be called to the attention of an expert on cross-examination or relied upon by him in direct examination. This provision is designed to ensure that the materials are used only under the sponsorship of an expert who can assist the fact finder and explain how to apply the materials. This policy is furthered by the prohibition against admission as exhibits, which prevents sending the materials to the jury room.") (notes omitted). Wisconsin rejects both features: expert chaperones are not required and the treatise may be received, and used, as an exhibit.

<sup>4</sup>Ansani v. Cascade Mountain, Inc., 223 Wis. 2d 39, 588 N.W.2d 321, 326 (Ct. App. 1998) (learned treatise erroneously admitted during cross-examination because the proponent

failed to demonstrate the article's reliability; the court held that the "status of the publication itself is not sufficient to establish that the writer of an article included therein is reliable," rather the proponent must show that the "writer of a treatise or an article [is] recognized as an expert in the field"; the error was, however, harmless).

Broadhead v. State Farm Mut. Auto. Ins. Co., 217 Wis. 2d 231, 579 N.W.2d 761, 766-67 (Ct. App. 1998) (the learned treatise exception "plainly requires that before an excerpt from a periodical article may be admitted as substantive evidence, an expert in the field must testify that 'the writer of the statement in the . . . periodical . . . is recognized as an expert in the subject'"; the error was, however, harmless).

<sup>5</sup>See § 201.1.

same standards that govern expert witnesses under Wis. Stats. § 907.02, because the writing is tantamount to expert testimony by the writer/declarant if admitted.<sup>6</sup>

The Wisconsin rule applies to published treatises, periodicals and pamphlets on a subject of "history, science or art." The parallel federal rule has been revised to eliminate any reference to subject matter, only referring to "a treatise, periodical, or pamphlet." According to McCormick, the "rule historically has been broadly applied including standards and manuals published by government agencies and industry or professional organizations."<sup>7</sup> Wisconsin law is in accord.<sup>8</sup> The subject matter is a less significant concern (and one better addressed through relevancy) than the reliability inherent in published works. Moreover, it is very likely that expert testimony on the subject of industry standards consists of a rehashing of the contents of such standards and manuals.

Learned treatises convey an authoritative "textbook" aura, yet they carry no presumptive effect. Under the rule a treatise, periodical or pamphlet is admissible as "tending" to prove the truth of the matter asserted. Thus, statements within a learned treatise are weighed like any other item of evidence.

Subsections (a) and (b) of Wis. Stats. § 908.03(18) set forth procedural mandates governing the use of learned treatises as substantive evidence. Under subsection (a) the proponent of a learned treatise must provide the requisite notice to the opposing counsel at least 40 days before trial.<sup>9</sup> The notice is directed at those facts tending to show the author's qualifications and the details surrounding the work's publication. The notice must "fully describe the document" and provide its title (name), the author's name, the publication date, the publisher's name, and a specific reference to those statements that will be offered for their truth. Finally, the proponent must include a copy of the treatise in pertinent part. A thorough and accurate notice should obviate

<sup>6</sup>See § 702.602.

<sup>7</sup>McCormick on Evidence § 321 (7th ed.).

<sup>8</sup>See *Lievrouw v. Roth*, 157 Wis. 2d 332, 459 N.W.2d 850, 858 n.9 (Ct. App. 1990) (pages of *Wisconsin Motorist Handbook* discussing effect of alcohol on drivers were admissible under the learned treatise exception and the public records exception).

See also Wis. Stats. § 908.03(18) Judicial Council Committee's Note (the Wisconsin rule was based on a provision of the Model Code of Evidence which allowed a more liberal

<sup>9</sup>State v. Schroeder, 2000 WI App 128, ¶ 10, 237 Wis. 2d 575, 613 N.W.2d 911, 915 (Ct. App. 2000) (proponent produced "a few pages from a learned treatise" on the morning of trial without providing any notice; held that any error was harmless). The rule is silent about its applicability where the learned treatise is introduced at an evidentiary hearing as opposed to a trial. It is suggested that the term "trial" should be taken literally, in the absence of any contrary intent.

any questions about authenticity or the fact of publication.<sup>10</sup> Of course other objections may also be asserted, such as irrelevance or unfair prejudice.<sup>11</sup>

If opposing counsel contemplates the introduction of a rebutting treatise, subsection (b) requires that reciprocal notice be given within 20 days after service of the notice required by subsection (a). The reciprocal notice of the rebutting treatise is identical to that governing the initial notice.

Subsection (c) empowers the trial court, in an appropriate case, to relieve the parties "from the requirements of this section in order to prevent a manifest injustice." Although the legislative history is unenlightening, it appears that the "relief" is limited to the notice requirements of subsections (a) and (b). The latitude does not extend to the elements of the hearsay exception itself. The federal rule does not carry these notice provisions because of its "chaperonage" requirement. It is suggested that the notice provisions should be rigidly enforced only in the absence of accompanying expert testimony.

The notice requirements set forth in subsections (a) through (c) are not applicable to "impeachment on cross-examination." Put differently, a cross-examiner may use a learned treatise to impeach the witness regardless of whether notice was given.<sup>12</sup> There is no requirement that the witness must have "relied" upon the work in rendering an opinion.<sup>13</sup> Nor must the witness acknowledge the authoritative nature of the work during cross-examination where it is used only for impeachment purposes.<sup>14</sup> The sharp distinction between a treatise's use for impeachment

<sup>10</sup> *Jones v. Dane County*, 195 Wis. 2d 892, 537 N.W.2d 74, 90 (Ct. App. 1995) (court refused to address whether error occurred in the admissibility of a chapter from a book, where there was no showing that the failure to comply with the notice requirements prejudiced the objecting party: the expert only "partially" relied on the book, it was not given to the jury, and it was cumulative).

<sup>11</sup> *Wingad v. John Deere & Co.*, 187 Wis. 2d 441, 523 N.W.2d 274, 280 (Ct. App. 1994) (in a pretrial notice the defendant objected to various learned treatises on grounds of one being undated and the other being unpublished; held that additional objections to the treatises as irrelevant and prejudicial during motions after verdict were untimely and hence the objecting party waived any such error in their

admission at trial).

<sup>12</sup> *Ansani v. Cascade Mountain, Inc.*, 223 Wis. 2d 39, 588 N.W.2d 321, 326 (Ct. App. 1998) (a learned treatise can be used on cross-examination even without providing the statutory forty-day notice; harmless error occurred, however, because the proponent failed to show that the article's author was an "expert" in the field).

<sup>13</sup> See McCormick on Evidence § 321 (7th ed.) (discussing the federal rule, the authors observe that the learned material "may be called to the attention of an expert on cross-examination . . .").

<sup>14</sup> See McCormick on Evidence § 321 (3d ed.) ("Finally, some courts have permitted this use without regard to the witness' having relied upon or acknowledged the authority of the source if the cross-examiner estab-

and as substantive evidence seems appropriate. By definition, cross-examination presupposes an expert witness who is knowledgeable about the subject matter and is therefore able to assist the fact finder. Moreover, when used solely for impeachment, the treatise is not being offered as substantive evidence nor does it address the case-specific facts, which lessens the risk of inaccurate fact finding based on an unreliable source.

Published treatises, periodicals and pamphlets that meet the standards for substantive use may be received into evidence as an exhibit. Lengthy documents may be edited or redacted as needed under the court's authority in § 906.11 and § 904.03. The federal practice is different. Under Fed. R. Evid. 803(18) the treatise itself cannot be received into evidence; rather, statements in the work may be read into evidence, but the exhibit itself may not be received and thus cannot be sent to the jury room.<sup>15</sup> Under Wisconsin practice, concerns that the jury may give the exhibit undue weight may be allayed by controlling the jury's direct access to the document. In particular, the judge may permit counsel to reference the treatises during examinations and in closing argument but decline to send the materials to the jury room during deliberations.<sup>16</sup>

Since § 908.13(18) is a hearsay exception, it permits the use of the materials as proof of the matters asserted in the treatise or article. Such works may, however, be relevant under the doctrine of limited admissibility as proof of propositions other than the truth of what they assert and regardless of whether a foundation is present under § 908.03(18). The elastic nature of Wis. Stats. § 907.03 permits the proponent to use the treatise or periodical as a basis for the opinion of an expert witness despite its inadmissibility as hearsay.<sup>17</sup> For example, an expert witness may testify to the reliability of her methods and principles, as required by Wis. Stats. § 907.02, by referring to textbooks and manuals in her field irrespective of whether they are being offered under

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lishes the general authority of the material by any proof or by judicial notice . . ."). McCormick further observed that Wisconsin has adopted a "broad exception" to the hearsay rule for treatises and other professional literature, citing Wis. Stats. § 908.03(18) and *Lewandowski v. Preferred Risk Mut. Ins. Co.*, 33 Wis. 2d 69, 146 N.W.2d 505 (1966). The current edition of McCormick is revised but contains nothing inconsistent with the views expressed in the third edition. See McCormick on Evidence § 321 (7th ed.).

<sup>15</sup> Note that this parallels the federal treatment of exhibits used under the exception for past recollection recorded. See Fed. R. Evid. 803(5). Wisconsin rejected that approach in the context of recorded recollection as well. See § 803.5.

<sup>16</sup> See § 611.4. See Wis. Stats. § 908.03(18) Judicial Council Committee's Note.

<sup>17</sup> See § 702.6042. *E. D. Wesley Co. v. City of New Berlin*, 62 Wis. 2d 668, 674, 215 N.W.2d 657, 661 (1974).

## § 908.03(18).

One suspects that, in practice, a proponent who resorts to Wis. Stats. § 907.03 to justify the use of the treatise is doing so because of a failure to comply with the notice provisions of subsections (a) through (c). The trial court has the power to prevent wholesale abuse by the judicious exercise of discretion under Wis. Stats. § 904.03. It is also suggested that under Wis. Stats. § 907.03 the trial court has the authority to control the form in which the evidence is put before the jury. For example, rather than permitting the witness to read several critical pages from a treatise which formed the basis for the opinion, but which runs afoul of Wis. Stats. § 908.03(18), the court may simply allow the witness to refer generally to the work as supporting his conclusion.<sup>18</sup>

## § 908.03(19) REPUTATION CONCERNING PERSONAL OR FAMILY HISTORY

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

\* \* \*

## (19) Reputation concerning personal or family history.

Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, relationship by blood, adoption, or marriage, ancestry, whether the person is a marital or nonmarital child, or other similar fact of this personal or family history.

## AUTHOR'S COMMENTS

§ 803.19 Reputation concerning personal or family history

## § 803.19 Reputation concerning personal or family history

Reputations are the culmination of what other people say. In its least attractive form it constitutes gossip. Since reputation implicates out-of-court statements, it raises hearsay problems. Wis. Stats. § 908.03(19) allows reputation evidence to prove certain facets of a person's personal or family history. The rule is substantively identical to Fed. R. Evid. 803(19).

It must first be established that the person subject to the evidence in fact has a reputation concerning the matter.<sup>1</sup> Witnesses must testify that they have "heard" things said about the subject's personal or family history. Properly understood, a reputation is a

<sup>18</sup>See § 702.6042.

[Section 803.19]

<sup>1</sup>See § 803.21, discussing the

proper foundation for reputation evidence as to a person's character.

summary of the underlying statements. Indeed the reputation might be founded upon dozens or hundreds of statements overheard by the witness over the years. At any rate, the witness may only testify that the subject has a "reputation" and what that reputation consists of. The proponent may not elicit the individual statements under the guise of qualifying the reputation witness.<sup>2</sup> If the witness has not heard any gossip about these matters, either no "reputation" exists or the witness lacks personal knowledge of what it is. In any event, the foundation is defective. Care must be taken to ensure that the witness's personal opinion is not smuggled before the jury garbed as "reputation." The rule is silent about whether the reputation must predate the matter being litigated, although this seems a matter better addressed to weight than admissibility.

The source of the reputation evidence may be the subject's family by blood, adoption, or marriage. It may also be found among his "associates." The common law hearsay exception recognized a person's family and "intimates" as a proper source. The present rule expanded the scope to specifically encompass a person's reputation within the community.<sup>3</sup> The "community" is a network of social relationships most often rooted in the neighborhood or workplace (one's "intimates").

Wis. Stats. § 908.03(19) limits the subject matter of the reputation to a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.<sup>4</sup> When proving such facts, counsel should consider related hearsay exceptions for

<sup>2</sup>See the Judicial Council Committee's note, quoted below.

<sup>3</sup>Wis. Stats. § 908.03(19) Judicial Council Committee's Note (citations omitted):

Wisconsin cases are in accord with the principle of exception (19) that evidence of reputation among family and intimates is a hearsay exception; with respect to community reputation the Wisconsin law is uncertain. The earliest case refers to "general repute" without limiting it to the family and the latest case quotes a California case which excludes community reputation in questions of pedigree. The addition of community reputation to this provision should probably be considered a change in Wisconsin law because acknowledgement of the admissibility of "neighborhood notoriety" to establish a husband and wife relationship was not definitive in [an 1845 case]. Note the

comment to [Wis. Stats. § 906.08] with respect to the changing nature of the concept of "community based" reputation. Note also the difference between "reputation" and individuals' statements, [Wis. Stats. § 908.045(5)].

<sup>4</sup>Fed. R. Evid. 803(19) advisory committee's note (citations omitted): Exception (19) is concerned with matters of personal and family history. Marriage is universally conceded to be a proper subject of proof by evidence of reputation in the community. 5 Wigmore Sec. 1602. As to such items as legitimacy, relationship, adoption, birth, and death, the decisions are divided. Id. Sec. 1605. All seem to be susceptible to being the subject of well founded repute. The "world" in which the reputation may exist may be family, associates, or community. This world has proved capable of expanding with changing times from the single uncom-

records of religious organizations (§ 803.11), family records (§ 803.13), civil judgments establishing "family facts" (§ 803.23), and statements of personal or family history (§ 8045.5).

### § 908.03(20) REPUTATION CONCERNING BOUNDARIES OR GENERAL HISTORY

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

\* \* \*

**(20) Reputation concerning boundaries or general history.** Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

#### AUTHOR'S COMMENTS

§ 803.20 Reputation concerning boundaries or general history

### § 803.20 Reputation concerning boundaries or general history

This rule encompasses two distinct kinds of reputation evidence. For analytic purposes, it is best approached as two separate, distinct hearsay exceptions: Reputation concerning boundaries, and reputation as to general history. It is substantively identical to Fed. R. Evid. 803(20).

Wis. Stats. § 908.03(20) governs the use of reputation to prove land boundaries or customs affecting lands. It restricts the reputation of the land to the "community."<sup>1</sup> Unlike Wis. Stats. § 908.03(19), reputation among family members or "associates" is

plicated neighborhood, in which all activities take place, to the multiple and unrelated worlds of work, religious affiliation, and social activity, in each of which a reputation may be generated. The family has often served as the point of beginning for allowing community reputation.

#### [Section 803.20]

<sup>1</sup>See *Clair W. and Gladys Judd Family Ltd. Partnership v. Hutchings*, 797 P.2d 1088 (Utah 1990) (holding modified on other grounds by, *Van Dyke v. Chappell*, 818 P.2d 1023 (Utah 1991)). In this suit to quiet title, plaintiff challenged the trial court's exclusion of out-of-court statements by the prior owner about the boundaries.

Construing Utah R. Evid. 803(20), which is identical to the Wisconsin rule, the court observed:

It is apparent that plaintiff's proffered testimony did not consist of reputation in the community as to boundary. The statements were simply the subjective opinion of a former owner. Clearly, they did not qualify for admission, and the trial court did not err in its ruling. Rule 803(20) appears to be based on a principle recognized in *Boardman v. Reed & Ford's Lessees*, 31 U.S. 328, 8 L. Ed. 415, 420-21, 1832 WL 3411 (1832), where Justice McLean, speaking for the Supreme Court of the United States, said: "Landmarks are frequently formed of perishable materials, which pass away with the generation in which they are made. By the improvement of the country, and from

not contemplated. In other contexts, the Wisconsin Rules of Evidence construe "community" to include home and workplace. This result makes sense when the subject of the reputation (or opinion) is a human being and the issues revolve around facts of personal or family history, or a character trait for truthfulness. The people with whom one works or lives ("intimates") are the ones who are expected to best know the subject. Disputes over land boundaries or customs affecting land are of a different order. "Community" in this context should be construed as including those persons who have some connection with the land in question, whether arising out of geographical proximity or other contacts. Reputation among a group wholly unconnected with the subject matter lacks the necessary trustworthiness to justify admission.

The land's reputation may pertain to boundaries or "customs." The relevancy of whatever "customs" might exist is a function of property or tort law, not evidence law. The rule also requires that the reputation must have arisen prior to the controversy. In short, retrospective gossip occurring after the motive to litigate has arisen is inadmissible based on well-placed concerns about reliability. The land may be public or private.<sup>2</sup>

Wis. Stats. § 908.03(20) also provides a unique (and odd) hearsay exception for community reputation as to "events of general history important to the community or state or nation in which located."<sup>3</sup> Unlike land disputes, this type of evidence is not confined to reputation arising prior to the controversy being litigated, although undoubtedly most "events of general history" will have occurred long before the motive arose anyway. Apparently, this exception was intended to apply to "community knowledge" of certain facts which were not susceptible to judicial notice under Wis. Stats. § 902.01.<sup>4</sup> It is in no way clear what is meant by "events of general history," a term that was undoubtedly left

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other causes, they are often destroyed. It is therefore important, in many cases, that hearsay or reputation should be received to establish ancient boundaries . . . ." It is readily apparent that plaintiff was not attempting to prove the location of an ancient boundary by the alleged statements of [the prior owner].

<sup>2</sup>Wis. Stats. § 908.03(20) Judicial Council Committee's Note ("Boundary reputation evidence is admissible in Wisconsin [citation omitted], although earlier cases confuse weight and sufficiency of such evidence with admissibility.").

See also Fed. R. Evid. 803(20)

advisory committee's note ("The first portion of Exception (20) is based upon the general admissibility of evidence of reputation as to land boundaries and land customs, expanded in this county to include private as well as public boundaries. [citation omitted] The reputation is required to antedate the controversy, though not to be ancient.").

<sup>3</sup>Wis. Stats. § 908.03(20) Judicial Council Committee's Note ("No Wisconsin cases dealing with reputation as to historical events have been found.").

<sup>4</sup>Fed. R. Evid. 803(20) advisory committee's note ("The second portion

deliberately vague and likely to arise only in exotic cases.<sup>5</sup> Issues about the admissibility of "general history" are better left to relevancy under § 904.01 and the § 904.03 balancing test. Moreover, if the historical events are truly "important to the community," one might expect that they are more reliably described in learned treatises, Wis. Stats. § 908.03(18), or by a qualified local historian as an expert witness. Internet sources, duly authenticated, may also prove up such facts under the residual exception, § 908.03(24).

### § 908.03(21) REPUTATION AS TO CHARACTER

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

\* \* \*

**(21) Reputation as to character.** Reputation of a person's character among the person's associates or in the community.

#### AUTHOR'S COMMENTS

§ 803.21 Reputation as to character

**§ 803.21 Reputation as to character**

In some instances the law of evidence permits proof of a person's character traits (e.g., truthfulness) for a variety of purposes, including as circumstantial evidence of conduct (e.g., that same person is being truthful today in court). The admissibility of character evidence presents a problem of relevancy that is closely regulated by other rules. Wis. Stats. § 904.04 and Wis. Stats. § 904.05 control the use of character evidence generally, while Wis. Stats. § 906.08 concerns the special problem of a witness's character for truthfulness.<sup>1</sup> A character trait is established by "character witnesses" who testify about the subject's reputation or their personal opinion of the trait. Wis. Stats. § 908.03(21) only serves as a hearsay exception. It regulates neither when character is admissible nor the permitted forms of evidence. The rule is substantively identical to Fed. R. Evid. 803(21).

Reputation consists of testimony describing what others have

is likewise supported by authority . . . , and is designed to facilitate proof of events when judicial notice is not available. The historical character of the subject matter dispenses with any need that the reputation antedate the controversy with respect to which it is offered.").

<sup>5</sup>E.g., U.S. v. Belfast, 611 F.3d

783, 821 (11th Cir. 2010) (defendant prosecuted under the Torture Act for his crimes in Liberia; a knowledgeable state department official provided "background" about the conflict which the court deemed admissible under Fed. R. Evid. 803(20)).

[Section 803.21]

<sup>1</sup>See §§ 404.1, 405.2 and 608.1.

said about the subject's character trait: in a word, "gossip." Wis. Stats. § 908.03(21) is the hearsay exception that permits character witnesses to place the gossip's substance before the trier of fact. The rule contemplates the subject's reputation among his or her "associates or in the community." The "community" may be the subject's home or workplace.<sup>2</sup>

A "reputation" is in effect a summary of many other underlying statements. The rule permits introduction only of the reputation. The character witness is not permitted to testify about the particulars of the underlying statements in the guise of providing a foundation.<sup>3</sup>

Reputation evidence should not be confused with personal opinion. Reputation is "talk" and at its basest level is no more than gossip. The foundation for reputation evidence requires a showing that the character witness has "heard" things said about the subject's character trait by members of the community. Unless the character witness has been privy to the gossip, her testimony constitutes a personal opinion, but not "reputation."

#### § 908.03(22) JUDGMENT OF PREVIOUS CONVICTION

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

\* \* \*

**(22) Judgment of previous conviction.** Evidence of a final judgment, entered after a trial or upon a plea of guilty, but not upon a plea of no contest, adjudging a person guilty of a felony as defined in ss. 939.60 and 939.62 (3) (b), to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

#### AUTHOR'S COMMENTS

##### § 803.22 Judgment of previous conviction

##### § 803.22 Judgment of previous conviction

Wis. Stats. § 908.03(22) provides that a final judgment of a criminal conviction is admissible to prove any fact essential to sustain the judgment. This rule is substantially identical to Fed. R. Evid. 803(22) and represented a marked change in Wisconsin

<sup>2</sup>State v. Cuyler, 110 Wis. 2d 133, 139, 327 N.W.2d 662, 665 (1983).

et al., *Federal Practice and Procedure*, Evidence § 5264, at 575 (2d ed.).

<sup>3</sup>See § 405.1. Wright and Miller

law when it became effective in 1974.<sup>1</sup> Issues arising under this rule should be considered in light of Wis. Stats. § 904.10, which governs evidence of plea bargaining.<sup>2</sup>

This hearsay exception is limited only to felony criminal convictions, as defined by Wis. Stats. § 939.60 and Wis. Stats. § 939.62(3)(b).<sup>3</sup> Put differently, it is not applicable to civil judgments, misdemeanor judgments, or civil forfeiture convictions. Moreover, the felony judgment must be based on finding of guilt at trial or as a result of a guilty plea.<sup>4</sup> Felony convictions based on no contest (nolo contendre) pleas are not within this rule.<sup>5</sup> Finally, Wis. Stats. § 908.03(22) pertains only to judgments of guilt. Acquittals are not included. In sum, the exception is predicated upon the factual certainty that inheres in a finding of guilt beyond a reasonable doubt following a contested trial or the defendant's explicit plea of "guilty" to the charge.

Felony judgments that fall within the rule are admissible to prove any fact essential to sustain the conviction. These "es-

**[Section 803.22]**

<sup>1</sup>Wis. Stats. § 908.03(22) Judicial Council Committee's Note. Current Fed. R. Evid. 803(22) states:

**(22) Judgment of a Previous Conviction.** Evidence of a final judgment of conviction if:

(A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

(B) the conviction was for a crime punishable by death or by imprisonment for more than a year;

(C) the evidence is admitted to prove any fact essential to the judgment; and

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

<sup>2</sup>See § 410.1.

<sup>3</sup>See Hammer & Donohoo, *Substantive Criminal Law in Wisconsin* § 192 (1988). The reasons for this limitation are set forth in the advisory committee's note to Fed. R. Evid. 803(22):

Practical considerations require exclusion of convictions of minor offenses, not because the administration of jus-

tice in its lower echelons must be inferior, but because motivation to defend at this level is often minimal or nonexistent.

<sup>4</sup>Where the conviction follows a guilty plea, the admissibility of the judgment should be distinguished from that of the statements made during the guilty plea proceedings. Wis. Stats. § 908.03(22) governs the admissibility of the judgment of conviction. The guilty plea proceeding, including statements by the defendant, attorneys and judge, must come within some other hearsay exception. See Wis. Stats. §§ 908.01(4)(b) (admissions by party opponent) and 908.045(4) (statements against interest).

<sup>5</sup>See also § 410.1. See *State v. Rachwal*, 159 Wis. 2d 494, 465 N.W.2d 490, 497 (1991) ("With respect to the second issue, we note that 'the essential characteristic of a plea of nolo contendere is that it cannot be used collaterally as an admission.' Collateral use of a no contest plea occurs when the admission is used 'in another action' or 'in another case,' in an action or case wholly independent of and separate from the action or case in which the no contest plea takes place.") (internal quotations and citations omitted).

sential facts" constitute the elements of the offense.<sup>6</sup> Despite the authoritative cast that such judgments carry, Wis. Stats. § 908.03(22) is simply a hearsay exception; the prior judgment is accorded only that weight which the trier of fact deems appropriate.<sup>7</sup> The person against whom the judgment was entered may rebut it or attempt to explain it, subject to the discretion of the trial court under Wis. Stats. § 904.03.<sup>8</sup> Moreover, the rule is limited solely to the admissibility of the judgment of conviction. Other statements surrounding the judgment (e.g. the guilty plea itself) must be scrutinized under other hearsay exceptions.

Whenever civil litigation follows a criminal judgment, § 908.03(22) must be considered alongside of issue and claim preclusion, doctrines of civil procedure that carry different requirements and vastly greater effect than any hearsay exception. Although these doctrines are distinct from, and far more encompassing than, § 908.03(22), questions about the one normally beget interest in the other, so a brief discussion is in order.

Issue preclusion was described by the supreme court in *Mrozek v. Intra Financial Corp.*:<sup>9</sup>

Issue preclusion addresses the effect of a prior judgment on the

<sup>6</sup>Usually, the essential facts represent the elements of the criminal offense. But the prevalent use of general verdicts in criminal cases may make it difficult to determine what the essential facts were in a given case. See the discussion of *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 71 S. Ct. 408, 95 L. Ed. 534 (1951) at 4 Weinstein's Evidence, § 803(22)[01] at 803-358 (1984).

<sup>7</sup>Prior to the enactment of Wis. Stats. § 908.03(22), criminal convictions were inadmissible as evidence in subsequent civil proceedings. This change has been noted in several cases. *Poston v. U. S. Fidelity & Guarantee Co.*, 107 Wis. 2d 215, 320 N.W.2d 9, 35 A.L.R.4th 1054 (Ct. App. 1982) (on the question of insurance coverage, the insured's prior conviction for injury by conduct regardless of life was admissible in the subsequent civil lawsuit arising out of the same incident under Wis. Stats. § 908.03(22)); *N.N. by Donovan v. Moraine Mut. Ins. Co.*, 148 Wis. 2d 311, 434 N.W.2d 845 (Ct. App. 1988), decision rev'd on other grounds, 153

Wis. 2d 84, 450 N.W.2d 445 (1990) (civil action involving defendant's sexual assault of a minor; although the court refused to give collateral estoppel effect to the defendant's criminal conviction for first degree sexual assault arising out of the same incident, it did observe that the criminal judgment constituted evidence under Wis. Stats. § 908.03(22)). Occasionally, however, the evidentiary innovation has been overlooked. See *In Matter of Safran's Estate*, 102 Wis. 2d 79, 94, 306 N.W.2d 27, 34, 25 A.L.R.4th 766 (1981) where the court stated in dicta and without citation to Wis. Stats. § 908.03(22):

[A] criminal conviction, whether based on a plea of no contest or upon a verdict of guilty, is generally not admissible in a subsequent civil action.

This statement is inaccurate in light of Wis. Stats. § 908.03(22).

<sup>8</sup>Graham, *Handbook of Federal Evidence* § 803:22 (7th ed.).

<sup>9</sup>*Mrozek v. Intra Financial Corp.*, 2005 WI 73, ¶ 17, 281 Wis. 2d 448, 699 N.W.2d 54 (2005). See *Flooring Brokers, Inc. v. Florstar Sales, Inc.*,

## § 803.22

ability to re-litigate an identical issue of law or fact in a subsequent action. *Northern States Power Co. v. Bugher*, 189 Wis. 2d 541, 550-51, 525 N.W.2d 723 (1995). In order for issue preclusion to be a potential limit on subsequent litigation, the question of fact or law that is sought to be precluded actually must have been litigated in a previous action and be necessary to the judgment. *Town of Delafield v. Winkelman*, 2004 WI 17, ¶ 34, 269 Wis. 2d 109, 675 N.W.2d 470; *Michelle T. by Sumpter v. Crozier*, 173 Wis. 2d 681, 687, 495 N.W.2d 327 (1993). If the issue actually has been litigated and is necessary to the judgment, the circuit court must then conduct a fairness analysis to determine whether it is fundamentally fair to employ issue preclusion given the circumstances of the particular case at hand. *Paige K.B. ex rel. Peterson v. Steven G.B.*, 226 Wis. 2d 210, 220-21, 594 N.W.2d 370 (1999). For this analysis, the circuit court considers any of the following factors that are relevant to its decision: (1) whether the party against whom preclusion is sought could have obtained review of the judgment; (2) whether the question is one of law that involves two distinct claims or intervening contextual shifts in the law; (3) whether there are apt to be significant differences in the quality or extensiveness of the two proceedings such that relitigation of the issue is warranted; (4) whether the burden of persuasion has shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; and (5) whether matters of public policy or individual circumstances would render the application of issue preclusion fundamentally unfair, including whether the party against whom preclusion is sought had an inadequate opportunity or incentive to obtain a full and fair adjudication of the issue in the initial litigation. *Michelle T. by Sumpter v. Crozier*, 173 Wis. 2d 681, 688-89, 495 N.W.2d 327 (1993) (citing *Restatement (Second) of Judgments* § 28 (1980)). Some of these factors are decided as questions of law, e.g., factors 1, 2 and 4. *Paige K.B. ex rel. Peterson v. Steven G.B.*, 226 Wis. 2d 210, 223-24, 594 N.W.2d 370 (1999). Other factors require the circuit court to exercise its discretion, for example, factors 3 and 5. *Id.* at 225, 594 N.W.2d 370.

Addressing an issue never "squarely confronted" before, *Mrozek* held that a judgment of conviction based on a guilty plea does not carry issue preclusive effect:

While a Wisconsin circuit court must make an inquiry sufficient to satisfy it that the defendant committed the crime before accepting the plea, such an inquiry is not the same as a fully litigated trial between adversarial parties resulting in the fact-finder determining that the facts prove the defendant committed the crime. For example, a circuit court may satisfy its obligation of inquiry under [Wis. Stats. § 971.08(1)(b)] by incorporating by reference the facts adduced at the preliminary hearing. Furthermore, a defendant who pleads guilty need not admit the facts of a crime that has been charged as a precondition to a court accepting his or her plea.

2010 WI App 40, 324 Wis. 2d 196, 781 N.W.2d 248 (Ct. App. 2010) (issue preclusion was inappropriate because

the issues in question had not been litigated in the prior litigation).

Therefore, we conclude that Mrozek's guilty pleas do not fulfill the "actually litigated" requirement for issue preclusion.<sup>10</sup>

Thus, a criminal defendant who pleads guilty (as opposed to no contest) is not faced with the prospect of issue preclusion in any later civil litigation related to the criminal judgment, but § 908.03(22) permits the opposing party to offer the criminal judgment as "evidence." One suspects that a felony judgment of conviction, whether predicated upon a guilty plea and its attendant admissions by a party opponent, or a jury's verdict following a criminal trial, weighs heavily with the trier of fact, so the distinction may have its greatest significance for purposes of summary judgment.

Claim preclusion "provides that a final judgment on the merits in one action bars parties from relitigating any claim that arises out of the same relevant facts, transactions, or occurrences. When the doctrine of claim preclusion is applied, a final judgment on the merits will ordinarily bar all matters 'which were litigated or which might have been litigated in the former proceedings.'"<sup>11</sup> The doctrine of claim preclusion addresses the effect of prior civil litigation on a later civil lawsuit; thus, it has no direct bearing on a prior criminal prosecution that results in a judgment a conviction, which is the evidence encompassed by § 908.03(22). Nonetheless, for the reader's convenience authority discussing claim preclusion is set forth in the margin.<sup>12</sup>

In criminal cases the prosecution may not use a third party's criminal conviction for any purpose other than to impeach a witness. More specifically, the rule precludes the prosecution from using a third party's conviction as proof of "guilt by association," where the third party is linked to the defendant.<sup>13</sup> Aside from Wis. Stats. § 908.03(22), the defendant's Sixth Amendment

<sup>10</sup> *Mrozek v. Intra Financial Corp.*, 2005 WI 73 at ¶ 21 (citations omitted).

<sup>11</sup> *Kruckenberg v. Harvey*, 2005 WI 43, ¶ 19, 279 Wis. 2d 520, 694 N.W.2d 879 (2005) (explaining that "[c]laim preclusion . . . provides an effective and useful means to establish and fix the rights of individuals, to relieve parties of the cost and vexation of multiple lawsuits, to conserve judicial resources, to prevent inconsistent decisions, and to encourage reliance on adjudication. The doctrine of claim preclusion recognizes that 'endless litigation leads to chaos; that certainty in legal relations must be maintained; that after a party has had his day in court, justice, expediency, and the

preservation of the public tranquility requires that the matter be at an end.'") (internal quotations omitted) (note omitted).

<sup>12</sup> *Kruckenberg v. Harvey*, 2005 WI 43, 279 Wis. 2d 520, 694 N.W.2d 879 (2005), features a detailed explanation of claim preclusion and its underlying policy.

For a discussion of claim preclusion and counterclaims, see *Menard, Inc. v. Liteway Lighting Products*, 2005 WI 98, 282 Wis. 2d 582, 698 N.W.2d 738 (2005).

<sup>13</sup> Fed. R. Evid. 803(22) advisory committee's note ("the exception does not include evidence of the conviction of a third person, offered against the

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confrontation right compels the same result. These considerations do not apply where the criminal statute under which a defendant is being prosecuted requires proof of the criminal status of another individual.<sup>14</sup>

**§ 908.03(23) JUDGMENT AS TO PERSONAL, FAMILY OR GENERAL HISTORY, OR BOUNDARIES**

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

\* \* \*

**(23) Judgment as to personal, family or general history, or boundaries.** Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

**AUTHOR'S COMMENTS**

**§ 803.23 Judgment as to personal, family or general history, or boundaries**

**§ 803.23 Judgment as to personal, family or general history, or boundaries**

Civil judgments are admissible as evidence where relevant to matters pertaining to personal, family, or general history. Judgments are also admissible as proof of boundaries.<sup>1</sup> The fact relating to a land boundary or matter of personal, family, or general

accused in a criminal prosecution to prove an fact essential to sustain the judgment of conviction. A contrary position would seem clearly to violate the right of confrontation. Kirby v. U.S., 174 U.S. 47, 19 S. Ct. 574, 43 L. Ed. 890 (1899), error to convict of possessing stolen postage stamps with the only evidence of theft being the record of conviction of the thieves".

<sup>14</sup>Fed. R. Evid. 803(22) advisory committee's note. For example, the crime of "Escape" may require a showing that the defendant intentionally assisted the escape of a person who had been convicted of a crime. See § 946.42(3).

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<sup>1</sup>Fed. R. Evid. 803(23) advisory committee's note:

The leading case in the United States, Patterson v. Gaines, 47 U.S. (6 How.)

550, 559, 12 L. Ed. 553 (1847), follows in the pattern of the English decisions, mentioning as illustrative matters thus provable: manorial rights, public rights of way, immemorial custom, disputed boundary, and pedigree. More recent recognition of the principle is found in Grant Bros. Construction Company v. United States, 232 U.S. 647, 34 S. Ct. 452, 58 L. Ed. 776 (1914), in action for penalties under Alien Contract Labor Law, decision of board of inquiry of Immigration Service admissible to prove alienage of laborers, as a matter of pedigree; United States v. Mid-Continent Petroleum Corp., 67 F.2d 37 (10th Cir. 1933), records of commission enrolling Indians admissible on pedigree; Jung Yen Loy v. Cahill, 81 F.2d 809 (9th Cir. 1936), board decisions as to citizenship of plaintiff's father admissible in proceeding for declaration of citizenship. Contra, In re Estate of Cunha, 49 Haw. 273, 414 P.2d 925 (1966).

history must have been essential to the prior judgment.

Wis. Stats. § 908.03(23) originated at common law, where a judgment was viewed as a way of establishing reputation.<sup>2</sup> The affinity between judgments and reputation is carried into the modern rule. Civil judgments and reputation are largely confined to the same subjects; that is, land boundaries and matters of personal, family, or general history.<sup>3</sup> The rule is substantively identical to Fed. R. Evid. 803(23).

This rule provides only a hearsay exception for the prior judgment.<sup>4</sup> If received into evidence, it may be given whatever weight the trier of fact deems appropriate. Wis. Stats. § 908.03(23) does not govern issue or claim preclusion, which are discussed in somewhat more depth in connection with criminal judgments as evidence in § 803.22. The trial judge may exclude the evidence or limit its admissibility in accordance with the factors set forth in Wis. Stats. § 904.03.

#### § 908.03(24) OTHER EXCEPTIONS

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

\* \* \*

**(24) Other exceptions.** A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

<sup>2</sup>Fed. R. Evid. 803(23) advisory committee's note:

A hearsay exception in this area was originally justified on the ground that verdicts were evidence of reputation. As trial by jury graduated from the category of neighborhood inquests, this theory lost its validity. It was never valid as to chancery decrees. Nevertheless the rule persisted though the judges and writers shifted ground and began saying that the judgment or decree was as good evidence as reputation. See *City of London v. Clerke, Carth.* 181, 90 Eng. Rep. 710 (K.B.1691); *Neill v. Duke of Devonshire*, 8 App. Cas. 135 (1882). The shift appears to be correct, since the process of inquiry, sifting, and scrutiny which is relied upon to render reputation reliable is present in perhaps greater measure in the process of litigation. While this might suggest a broader area of application, the affinity to reputation is strong, and paragraph (23) goes no further, not even including character.

<sup>3</sup>See Wis. Stats. §§ 908.03(19), (20). Character may not be proven through this provision, even in those rare instances where it was an essential element of a judgment.

<sup>4</sup>Wis. Stats. § 908.03(22) Judicial Council Committee's Note ("The provision incorporates the principle that civil judgments are evidence of some facts essential to sustain the judgment. The facts which may be so established are those provable by reputation under exceptions (19) and (20). In *In re Cogan's Estate*, 267 Wis. 20, 26, 64 N.W.2d 454, 457 (1954), a finding in a judgment of divorce that the petitioner was not a child of the marriage dissolved by the judgment was held not conclusive of that fact in an estate proceeding, however the judgment had been received as evidence of that fact. Wisconsin law seems consistent with this provision.").

## AUTHOR'S COMMENTS

## § 803.24 The residual exceptions

## § 803.24 The residual exceptions

It is ironic that one of the shortest rules appears twice among the evidence rules and arguably carries one of the broadest grants of discretion. The Wisconsin Rules of Evidence contain two "residual" hearsay exceptions: Wis. Stats. § 908.03(24) and Wis. Stats. § 908.045(6). The rules are identically worded and appear at the end of each of the two principal groupings of hearsay exceptions. One residual provision follows the twenty-three Wis. Stats. § 908.03 exceptions, where the declarant's availability to testify is immaterial to admissibility. The other residual follows the Wis. Stats. § 908.045 hearsay exceptions, which are predicated upon a showing of the declarant's unavailability to testify. The residuals are a compromise between concerns that reliable evidence might be unreasonably excluded by static rules and the law's obsessive fear of hearsay.<sup>1</sup>

Wisconsin case law does not dogmatically distinguish between Wis. Stats. § 908.03(24) and Wis. Stats. § 908.045(6). References to one or the other appear to be arbitrary or done within the context of discussing some *other* arguably applicable hearsay exception, or even a rule that simply furnishes an analogy. This lends itself to what has been called the "near miss" theory, where admissibility under a residual depends upon how "close" it came to fitting within some other exception or exemption: if the hearsay is a "near miss" to a specific exception, the hearsay should be excluded in homage (apparently) to the established exception.<sup>2</sup> The "near miss" theory has been generally rejected because it arguably defeats the very purpose the residuals were designed to serve; namely, allowing a flexible device for escaping the blinding formalism of the enumerated exceptions.<sup>3</sup> The Wisconsin Supreme Court has specifically rejected the argument that the residuals should not be used where the evidence is "similar" to one of the enumerated exceptions but nonetheless fails to qualify under it:

## [Section 803.24]

<sup>1</sup>State v. Anderson, 2005 WI 54, ¶ 56, 280 Wis. 2d 104, 695 N.W.2d 731 (2005) (*quoting the treatise*).

McCormick on Evidence § 324 (6th ed.).

<sup>2</sup>See Giannelli, Understanding Evidence § 35.03 (4<sup>th</sup> ed.).

<sup>3</sup>State v. Petrovic, 224 Wis. 2d 477, 592 N.W.2d 238, 241 (Ct. App.

1999) ("The residual exception should only be applied to the 'novel or unanticipated category of hearsay that does not fall under one of the named categories.'") (citation omitted).

McCormick on Evidence § 324 (7th ed.) ("The almost unanimous opinion of courts is that failing to qualify under an enumerated exception does not disqualify admission under the residual exception.").

[W]e cannot accept the defendant's argument that evidence which is similar to an enumerated hearsay exception cannot be a residual exception under [Wis. Stats. § 908.03(24)]. On the contrary, since the enumerated hearsay exceptions represent types of evidence traditionally considered to have strong circumstantial guarantees of trustworthiness, hearsay admitted under the residual exception is more likely than not to have close affinities to the exceptions specifically enumerated by the rules.<sup>4</sup>

Why the drafters created two separate but identical exceptions remains a minor mystery. The current Wisconsin rules tracked the original Federal Rules of Evidence in creating the twins. The federal rules solved their own conundrum by later deleting both Fed. R. Evid. 803(24) and 804(b)(5) and creating a single residual: Rule 807, which appears in the margin.<sup>5</sup> The accompanying Advisory Committee Note explains that the two rules were combined in order "to facilitate additions to Rules 803 and 804." No change in meaning was intended by the federal revisors.<sup>6</sup>

Wisconsin's residual rules are far more laconic than Fed. R. Evid. 807.<sup>7</sup> They admit hearsay statements not specifically covered by "the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness." Since the Wisconsin rules were taken verbatim from the original Supreme Court version of the federal rules, Wisconsin courts have relied upon the federal advisory committee's notes. Drawing upon the work of the advisory committee, the Wisconsin Supreme Court observed:

The residual exceptions was initially created as part of the Federal Rules of Evidence and adopted in Wisconsin as part of [Wis. Stats. Ch. 908] in 1974. The federal advisory committee's notes, 59 Wis.

<sup>4</sup>State v. Anderson, 2005 WI 54, ¶ 57, 280 Wis. 2d 104, 695 N.W.2d 731 (2005) (quoting the treatise).

Mitchell v. State, 84 Wis. 2d 325, 332, 267 N.W.2d 349, 352 (1978).

<sup>5</sup>

**Rule 807. Residual Exception:**

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

(1) the statement has equivalent circumstantial guarantees of trustworthiness;

(2) it is offered as evidence of a material fact;

(3) it is more probative on the point for which it is offered than any other evidence that the propo-

nent can obtain through reasonable efforts; and

(4) admitting it will best serve the purposes of these rules and the interests of justice.

(b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

<sup>6</sup>See McCormick on Evidence § 324 (6th ed.).

<sup>7</sup>The terse Wisconsin version differed from the original federal rules, which are substantively similar to Fed. R. Evid. 807. See McCormick on Evidence § 324 (7<sup>th</sup> ed.).

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2d R301, R302, R323 (1974) explain that it was designed because not every hearsay contingency was anticipated by specific rules. This exception was to provide flexibility needed to permit growth and development in the law of evidence. While not contemplating unfettered judicial discretion, its use was intended to allow admission of evidence under new and unanticipated situations which demonstrate a trustworthiness consistent with that required under other specifically stated exceptions.<sup>8</sup>

Congress ultimately amended the federal residuals by adding language that is reflected in present Rule 807. Despite the textual differences between the Wisconsin and federal versions, it does not seem that the two rules produce remarkably different results.

Nor have the residual exceptions suffered from overuse. In part this may reflect the bar's conservative nature and the reluctance of trial lawyers or courts to use them more frequently. But the relatively infrequent use of the residuals should be placed in the context of a hearsay rule that carries over 36 formally recognized exceptions, some of which are extremely broad. Moreover, one should also consider the relatively narrow definition of "hearsay," the expansive treatment of hearsay under Wis. Stats. § 907.03, and the operation of the waiver/forfeiture rule.<sup>9</sup> Whatever the reason, there has been no explosion of case law under these exceptions nor anything approaching the doom for the hearsay rule forecast by some.

At the outset, it is important to try and determine what approach should be taken toward the residuals. One view is entirely case-specific, that is, the residuals are exceptions to be applied to the evidence in the particular case, but are not to be used to create new classes of hearsay exceptions.<sup>10</sup> A second approach would allow the use of the residuals as a basis upon which to carve new categorical exceptions. A third approach blends the first two and identifies factors that the trial court should weigh in deciding whether to apply the residuals in certain recurring situations.

Although the supreme court has not had the opportunity or need to squarely decide this question, it appears that Wisconsin

<sup>8</sup>State v. Sorenson, 143 Wis. 2d 226, 242-43, 421 N.W.2d 77, 83 (1988) (*Sorenson II*).

<sup>9</sup>One must consider the 23 specific exceptions in Wis. Stats. § 908.03, the six exceptions in Wis. Stats. § 908.045 and the so-called "exemption" rules governing prior statements by witnesses and admissions by party opponents in Wis. Stats. § 908.01. See § 802.1.

<sup>10</sup>In *Mitchell v. State*, 84 Wis. 2d 325, 267 N.W.2d 349 (1978), the court declined to create a new species of hearsay exception regarding statements of ownership and nonconsent applicable only at preliminary examinations. The court's rejection of this proposal focused more on the merits of the proposal than any misgivings about whether the residuals could be used to fashion new categories of exceptions.

leans most nearly toward the third approach.<sup>11</sup> The supreme court has observed that the enumerated hearsay exceptions are based upon the following guarantees of trustworthiness:

The guarantees of trustworthiness which are found in the enumerated hearsay exceptions have been consolidated by Wigmore in his treatise on evidence as resting upon one or more of the following underlying premises:

- a. Where the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed;
- b. Where, even though a desire to falsify might present itself, other considerations such as the danger of easy detection or the fear of punishment would probably counteract its force;
- c. Where the statement was made under such conditions of publicity that an error, if it had occurred, would probably have been detected and corrected.<sup>12</sup>

<sup>11</sup>State v. Anderson, 2005 WI 54, ¶¶ 59-63, 280 Wis. 2d 104, 695 N.W.2d 731 (2005) (statements by murder victim to a co-worker that described an earlier attack and threat to kill by the defendant, the victim's son; although the hearsay was inadmissible under either the excited utterance exception or that for statements of recent perception, it was admissible under the residual exception as construed by *Sorenson*).

See Wis. Stats. § 908.03(24) Judicial Council Committee's Note ("The most recent illustration of the application of this provision for growth of the common law is the hearsay exception fabricated in *Wirth v. State*, 55 Wis. 2d 11, 197 N.W.2d 731 (1972), in which it was held that the label on a pre-packed, sealed bottle of codeine-type cough syrup, although hearsay, was supported by sufficient surrounding circumstances and thus admissible in evidence to establish the contents. Similarly, *Bertrang v. State*, 50 Wis. 2d 702, 184 N.W.2d 867 (1971), illustrates a hearsay exception that fails to qualify as a present sense impression or an excited utterance. The requirements of contemporaneity and spontaneity are modified in the special situation of a child victim of a sexual assault or traumatic experience.").

<sup>12</sup>State v. *Sorenson*, 143 Wis. 2d

226, 421 N.W.2d 77, 84 (1988) (*Sorenson II*), quoting Wigmore, *Evidence* § 1423 at 254 (Chadbourn rev. 1974).

State v. Anderson, 2005 WI 54, 280 Wis. 2d 104, 695 N.W.2d 731 (2005), holding admissible statements by a murder victim (Krnak) to a co-worker (Ellifson) that described an earlier attack and threat to kill by his son, the defendant:

We conclude that Ellifson's testimony bears sufficient indicia of trustworthiness because "the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed." *Id.* (quoting 5 Wigmore, *Evidence* § 1423, at 254 (Chadbourn rev. 1974)). The testimony at issue here arises from two coworkers who were engaged in an intimate conversation about problems they were experiencing with their adult sons. Krnak revealed a shocking story about a close family member—his son Andrew—who attacked and threatened to kill him. We can find no motive to fabricate based on the nature of this conversation, especially considering the fact that Krnak indicated that he was not going to be contacting the authorities about the assault. His remark about knowing how one was going to die demonstrates his sincerity in making the statement. There is no indication that Krnak was joking when making these comments. Further, the fact that Krnak's statement indicated that it was a close family member who

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The predominant concern is the declarant's sincerity, yet there must be circumstantial guarantees of reliability relating to perception, memory, and narration.

In *State v. Sorenson*,<sup>13</sup> (hereinafter *Sorenson II*) the court observed that since the enactment of the Wisconsin Rules of Evidence it had relied upon an "expansive" interpretation of the excited utterance exception in analyzing the admissibility of children's statements in abuse cases. While not barring the use of the excited utterance exception, the court noted the availability of the residuals and set forth five factors bearing upon the admissibility of children's statements:

- (1) The attributes of the child making the statement;<sup>14</sup>
- (2) The relationship between the child and the person to whom the statement was made;<sup>15</sup>
- (3) The circumstances under which the statement was made;<sup>16</sup>
- (4) The content of the statement;<sup>17</sup>

attacked him, rather than an unidentified stranger, is significant in that such an allegation might open oneself and his or her family to criticism and/or embarrassment.

Moreover, Krnak became visibly upset when relating this story, so much so that his face was red and he began shaking. Krnak appeared so distressed that Ellifson herself became upset upon hearing the story. Thus, Krnak was clearly under a great deal of stress when recounting his son's attempt to do away with him. Also of significance is the fact that the conversation between Krnak and Ellifson appears to have been spontaneous, as there is no indication they planned to discuss this topic.

<sup>13</sup>*State v. Sorenson*, 143 Wis. 2d 226, 421 N.W.2d 77 (1988) (*Sorenson II*).

<sup>14</sup>*Sorenson II*, 421 N.W.2d at 84 ("First, the attributes of the child making the statement should be examined, including age, ability to communicate verbally, to comprehend the statements or questions of others, to know the difference between truth and falsehood, and any fear of punishment, retribution or other personal interest, such as close familial relationship with the defendant, expressed by the child

which might affect the child's method of articulation or motivation to tell the truth.").

<sup>15</sup>*Sorenson II*, 421 N.W.2d at 84 ("Second, the court should examine the person to whom the statement was made, focusing on the person's relationship to the child, whether that relationship might have an impact upon the statement's trustworthiness, and any motivation of the recipient of the statement to fabricate or distort its contents.").

<sup>16</sup>*Sorenson II*, 421 N.W.2d at 85 ("Third, the court should review the circumstances under which the statement was made, including relation to the time of the alleged assault, the availability of a person in whom the child might confide, and other contextual factors which might enhance or detract from the statement's trustworthiness.").

<sup>17</sup>*Sorenson II*, 421 N.W.2d at 85 ("Fourth, the content of the statement itself should be examined, particularly noting any sign of deceit or falsity and whether the statement reveals a knowledge of matters not ordinarily attributable to a child of similar age.").

(5) Other corroborating evidence.<sup>18</sup>

The supreme court cautioned that no single factor was dispositive of admissibility, and that the weight accorded each factor may depend upon the particular case.<sup>19</sup>

*Sorenson II* should not be read as creating a hearsay exception for statements by child sexual assault victims. Rather, it provides a set of benchmarks that may be used in deciding the basic question of whether the statement is sufficiently trustworthy to be

<sup>18</sup> *Sorenson II*, 421 N.W.2d at 85 (“Finally, other corroborating evidence, such as physical evidence of assault, statements made to others, and opportunity or motive of the defendant, should be examined for consistency with the assertions made in the statement.”).

<sup>19</sup> *Sorenson II*, 421 N.W.2d at 85. Applying these factors to the facts of the case, the court held that the child’s statements had been properly admitted.

For videotaped statements of children, see *State v. Jimmie R.R.*, 2004 WI App 168, 276 Wis. 2d 447, 688 N.W.2d 1 (Ct. App. 2004) (upholding the admissibility of a videotaped statement by a child that also comported with § 908.08(3)); *State v. Snider*, 2003 WI App 172, ¶ 18, 266 Wis. 2d 830, 668 N.W.2d 784 (Ct. App. 2003) (holding that a child’s videotaped statement was admissible under *Sorenson*’s construction of the residual exception and regardless of whether it also qualified under § 908.08: “In applying the *Sorenson* factors to the videotaped statement, the trial court noted that the victim was ten years old at the time the statement was made and that her statements did not appear to be the product of adult manipulation because she demonstrated knowledge appropriate to her age and did not want to talk about certain areas of the male or female body. The court also noted the victim thought of Snider as an uncle and was concerned about whether he would see the video. Finally, the trial court concluded there were no signs of deceit or falsity on the video, and that the videotaped statement was consistent with the statement the victim had made to the guidance counselor five

hours earlier, and in many details, with the statement subsequently given to the detective by Snider himself.”). See § 808.1, where the procedures governing audiovisual recorded statements by children are discussed in more depth.

See also the following cases, which must be closely scrutinized in light of later cases dramatically revising the criminal defendant’s confrontation right, as discussed in § 802.301: *State v. Huntington*, 216 Wis. 2d 671, 575 N.W.2d 268, 275–77 (1998) (citing this treatise) (prosecution of a step-father for sexually assaulting a child under the age of 13 years; the court analyzed statements by the child to her mother, sister, and a police officer under both the residual exception and the excited utterance exception; applying the *Sorenson* factors in great detail, the court concluded that the statements were admissible under the residual exception); *State v. Petrovic*, 224 Wis. 2d 477, 592 N.W.2d 238, 242 (Ct. App. 1999) (trial court properly admitted hearsay uttered by the defendant’s five-year-old daughter in a drug prosecution; the judge found the girl “unavailable” for fear that testifying against her mother would be psychologically harmful and that all five *Sorenson* factors were satisfied); *State v. Kevin L.C.*, 216 Wis. 2d 166, 576 N.W.2d 62, 69 (Ct. App. 1997), review denied (five-year-old sexual assault victim appeared at trial but was unresponsive to questioning or denied recall; applying *Sorenson*, held that the child’s statements made to a social worker were admissible under the residual exception in Wis. Stats. § 908.045(6)).

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admitted for the truth of the matter asserted. The court did not, and could not, provide the kind of formulaic rule that characterizes the enumerated exceptions.<sup>20</sup> Case law after *Sorenson II* has

<sup>20</sup>Again with the caveat that the confrontation doctrine must be considered, see § 802.301, see the following cases:

*Admitting evidence*: State v. Jenkins, 168 Wis. 2d 175, 483 N.W.2d 262, 268–70 (Ct. App. 1992) (defendant convicted of first degree murder; a three-year-old child witnessed his mother's death; the child was interviewed by a prosecutor; by the time of trial the child was seven years old and remembered little of relevance; held that prosecutor could relate the substance of the child's interview under Wis. Stats. § 908.03(24), based on his review of notes taken during the interview by police; the court concluded that the statements had circumstantial guarantees of trustworthiness comparable to Wis. Stats. § 908.03(5) (past recollection recorded); immaterial that the child was a witness to a crime and not a victim); City of Menomonie v. Evensen Dodge, Inc., 163 Wis. 2d 226, 471 N.W.2d 513, 517 (Ct. App. 1991) (finding admissible certain documents showing the profit made on the use of the city's uninvested trust funds; the court carefully scrutinized the circumstances under which the document was prepared, focusing on the declarant's possible motive to misstate, the existence of corroboration and the manner in which the document was eventually disclosed); State v. Oliver, 161 Wis. 2d 140, 467 N.W.2d 211 (Ct. App. 1991) (defendant charged with child abuse appealed his bindover following a preliminary examination; the court put aside any issue involving the child/declarant's unavailability, finding that the child's statements were admissible under Wis. Stats. § 908.03(24)); State v. Jagielski, 161 Wis. 2d 67, 467 N.W.2d 196, 198–99 (Ct. App. 1991) (upholding admissibility of child sex abuse victim's statement); State v. Hinz, 121 Wis. 2d 282, 289, 360 N.W.2d 56, 60 (Ct. App. 1984)

(DOT blood alcohol chart admissible under Wis. Stats. § 908.03(8) (public records and reports) and Wis. Stats. § 908.03(24); the court reasoned that if it could take judicial notice of DOT stopping distance charts, then the blood alcohol chart was sufficiently reliable to be admitted as evidence); State v. Nowakowski, 67 Wis. 2d 545, 561, 227 N.W.2d 697, 706 (1975) (abrogated on other grounds by, State v. Petrone, 161 Wis. 2d 530, 468 N.W.2d 676 (1991)) (prosecution of public official for campaign law violations; document relating to defendant's voluntary campaign committee were admissible under Wis. Stats. § 908.03(24) because it was "a public document, filed under oath, was actually notarized by the defendant," and had circumstantial guarantees of trustworthiness).

*Excluding evidence*: State v. Tucker, 2003 WI 12, ¶ 32, 259 Wis. 2d 484, 657 N.W.2d 374 (2003) (trial court properly excluded hearsay statements made by an unavailable witness to a defense investigator; in general, the statements attempted to exculpate the defendant without inculpating the witness and the trial court properly found that they were not sufficiently reliable under the residual exception); Heggy v. Grutzner, 156 Wis. 2d 186, 456 N.W.2d 845, 851–52 (Ct. App. 1990) (harmless error committed where trial court used the residuals to admit hearsay lacking adequate circumstantial guarantees of trustworthiness; residuals cannot be used to admit "background" evidence); Liles v. Employers Mut. Ins. of Wausau, 121 Wis. 2d 492, 503, 377 N.W.2d 214, 215 (Ct. App. 1985) (witness's testimony in a prior proceeding was not admissible as a "deposition" or as "former testimony"; proponent could not rely on Wis. Stats. § 908.045 residual since there was no showing that the declarant was unavailable to testify); Johnson v. American Family Mut. Ins. Co., 9

explicitly extended its multi-factor analysis in contexts other than a minor's statements concerning abuse.<sup>21</sup>

#### § 908.04 HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE; DEFINITION OF UNAVAILABILITY

(1) "Unavailability as a witness" includes situations in which the declarant:

(a) Is exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(b) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the judge to do so; or

(c) Testifies to a lack of memory of the subject matter of the declarant's statement; or

(d) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(e) Is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance by process or other reasonable means.

(2) A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

(S.Ct. Order, 59 Wis.2d R1, R302; 1991 Wis. Act c. 32)

#### AUTHOR'S COMMENTS

§ 804.101 Definition of unavailability, generally

§ 804.102 Claim of privilege

Wis. 2d 633, 649, 287 N.W.2d 729, 737 (1980) (transcript of a decision by prior trial judge sustaining damages awarded at prior trial during post-verdict motions was not admissible under the residuals because of its potential for "prejudice"); Boyer v. State, 91 Wis. 2d 647, 664, 284 N.W.2d 30, 36 (1979) (statements by two citizens to the police were inadmissible even though they corroborated one another and were made to police; insufficient indicia of trustworthiness under Wis. Stats. § 908.045(6)).

<sup>21</sup>State v. Anderson, 2005 WI 54, ¶ 59 n.12, 280 Wis. 2d 104, 695 N.W.2d 731 (2005) (extensively quoted above: statements by murder victim to a co-worker that described an earlier attack and threat to kill by the defendant, the victim's adult son; although the hearsay was inadmissible under both the excited utterance exception and that for statements of recent perception, it was admissible under the residual exception as construed by Sorenson).

**§ 908.04**

- § 804.103 Refusal to testify
- § 804.104 Lack of memory
- § 804.105 Death, illness, and infirmity
- § 804.106 "Psychological scarring"
- § 804.107 Absence from the hearing or trial
- § 804.108 Unavailability resulting from wrongdoing

**§ 804.101 Definition of unavailability, generally**

At common law certain hearsay exceptions could be used only upon a showing of the declarant's unavailability to testify. Building on the common law, Wis. Stats. § 908.04 sets forth five categories of "unavailability" that are used in conjunction with the hearsay exceptions collected at Wis. Stats. § 908.045. More precisely, unavailability as defined in § 908.04 is a condition precedent for the use of the § 908.045 hearsay exceptions. These five categories of unavailability resemble parallel provisions governing the use of depositions at trial, but the two sets of rules have no direct bearing on one another.<sup>1</sup> A witness may be unavailable for purposes of introducing her deposition under Wis. Stats. § 804.07, yet fail to meet the unavailability standards of Wis. Stats. § 908.04.

Under Wis. Stats. § 908.04 it is the declarant's testimony that is unavailable, not necessarily the declarant him or herself. Unlike the common law, Wis. Stats. § 908.04 and Wis. Stats. § 908.045 do not pair an unavailability type with a particular exception.<sup>2</sup> Any of the Wis. Stats. § 908.045 exceptions may be used in conjunction with any of the forms of unavailability described by Wis. Stats. § 908.04. Although in practice Wis. Stats. § 908.04 encompasses almost all imaginable scenarios, there is no need to pigeon-hole every given instance into one of these broad, often overlapping categories. It is substantively consistent, though not identical, to Fed. R. Evid. 804(a).

All species of unavailability present preliminary questions of

**[Section 804.101]**

<sup>1</sup>See §§ 802.4 and 802.5. See *State v. Lindner*, 142 Wis. 2d 783, 790, 419 N.W.2d 352, 355 (Ct. App. 1987).

<sup>2</sup>Fed. R. Evid. 804 advisory committee's note:

At common law the unavailability requirement was evolved in connection with particular hearsay exceptions rather than along general lines. For example, see the separate explications of unavailability in relation to former testimony, declarations against interest, and statements of pedigree, sepa-

rately developed in McCormick Secs. 234, 257, and 297. However, no reason is apparent for making distinctions as to what satisfies unavailability for the different exceptions. The treatment in the rule is therefore uniform although differences in the range of process for witnesses between civil and criminal cases will lead to a less exacting requirement under item (5) [Fed. R. Evid. 804(a)(5)]. See Rule 45(e) of the Federal Rules of Civil Procedure and Rule 17(e) of the Federal Rules of Criminal Procedure.

admissibility for the trial judge to determine by a preponderance of the evidence, as provided by Wis. Stats. § 901.04(1).<sup>3</sup> The judge is not bound by the rules of evidence in making this finding, so hearsay may be used to establish, for example, the declarant's death or other "unavailability." The hearing should be conducted outside the presence of the jury because the judge alone decides the issue.

### § 804.102 Claim of privilege

A claim of privilege is the first form of unavailability. Under Wis. Stats. § 908.04(1)(a) the judge must "exempt" the declarant from testifying about the subject matter.<sup>1</sup> The witness (or an authorized person) must claim a privilege and the judge must rule that the claim is a valid one. Speculation that a declarant, if called, might assert a privilege is not sufficient.<sup>2</sup> The privilege asserted may be one found in Wis. Stats. Ch. 905 (e.g., lawyer-client) or one emanating from another source, such as the state or federal constitution.

The supreme court has developed specific procedures concerning a witness's assertion of the constitutional protection against self-incrimination, which are discussed in the margin.<sup>3</sup> Blanket assertions of the privilege against self-incrimination should not

<sup>1</sup>State v. Williams, 2002 WI 58, ¶ 68, 253 Wis. 2d 99, 644 N.W.2d 919 (2002) (defendant who sought to introduce hearsay under the penal interest exception "failed to meet his burden of showing due diligence" and thus established the declarant's "unavailability").

#### [Section 804.102]

<sup>2</sup>Fed. R. Evid. 804(a)(1) advisory committee's note ("Substantial authority supports the position that exercise of a claim of privilege by the declarant satisfies the requirement of unavailability (usually in connection with former testimony). [citations omitted] A ruling by the judge is required, which clearly implies that an actual claim of privilege be made.").

<sup>3</sup>State v. McConnochie, 121 Wis. 2d 57, 76, 358 N.W.2d 256, 266 (1984) ("Although La France possessed a fifth amendment privilege, it was not known that he would invoke that privilege until he was actually called.").

<sup>3</sup>In State v. Marks, 194 Wis. 2d 79, 533 N.W.2d 730, 734-36 (1995), the

supreme court elaborated upon unavailability within the Fifth Amendment context. The State called as its witness the defendant's alleged accomplice in the burglary. The witness had pleaded guilty and been sentenced for his involvement. When the witness asserted the Fifth Amendment privilege, claiming that he intended to seek sentence modification, the prosecutor offered the witness's testimony at a preliminary examination under the former testimony exception, Wis. Stats. § 908.045(1).

The privilege against self-incrimination, observed the court, "may be invoked whenever 'a witness has a real and appreciable apprehension that the information requested could be used against him in a criminal proceeding.'" 533 N.W.2d at 732. In an earlier case, State v. McConnochie, 121 Wis. 2d 57, 358 N.W.2d 256 (1984), the court held that any person, whether a defendant or witness, could invoke the privilege while still awaiting sentence. Thus, a person who pled guilty but who had not yet been sentenced could invoke the privilege and

be permitted because they obfuscate more than enlighten and create unnecessary difficulties on appeal.<sup>4</sup> It is suggested that the proponent (i.e., the party asking questions) should ask all relevant questions outside the jury's presence, at least in criminal cases. The witness should assert the privilege against self-incrimination to each question. This process facilitates the trial court's consideration of which questions, if any, have any tendency to incriminate the witness. And it may occur that the witness will answer some but not others. When such problems can be anticipated before trial, they should be dealt with at a pretrial hearing or, where the witness is represented by counsel, through written interrogatories.

In civil cases, Wisconsin permits an adverse inference from a witness's invocation of the privilege against self-incrimination, a rule discussed at § 513.1.

thereby be found "unavailable" under Wis. Stats. § 908.045. In *Marks*, the court elaborated upon *McConnochie*:

Because the question in *McConnochie* was limited to whether the Fifth Amendment privilege existed during the period of time between conviction and sentencing we did not go as far as [State v. Harris, 92 Wis. 2d 836, 285 N.W.2d 917 (Ct. App. 1979)] or [People v. Edgeston, 157 Ill. 2d 201, 191 Ill. Dec. 84, 623 N.E.2d 329 (1993)] in determining that a person retains the Fifth Amendment privilege while an appeal is pending or before the time for an appeal as of right or plea withdrawal has expired. We did, however, acknowledge that there was support for that position. We now so conclude.

A witness may reasonably and appreciably fear incrimination while an appeal is pending or during the time which a witness may, by right, appeal his or her conviction and has good faith intentions of doing so. Like *McConnochie*, where the witness feared the potential for a harsher sentence if he testified at his or accomplice's [sic] trial, a defendant who appeals, for example, on the sufficiency of the evidence might reasonably fear that his testimony at an accomplice's trial could strengthen the State's case at a new trial.

In addition, a witness might fear further prosecution if he or she intends to withdraw his or her plea, and still has

the common law right to do so . . . *Marks*, 533 N.W.2d at 734 (citations omitted). Further extending *McConnochie*, the supreme court observed:

[W]e hold that the Fifth Amendment privilege against self-incrimination extends beyond sentencing as long as a defendant has a real and appreciable fear of further incrimination as may be the case where an appeal is pending, before an appeal as of right or plea withdrawal has expired, or where the defendant intends to or is in the process of moving to modify his or her sentence and can show an appreciable chance of success.

*Marks*, 533 N.W.2d at 735. The court remanded the case for a determination of whether the witness had filed an appeal or preserved his rights to an appeal, expressed a good faith intention to withdraw his guilty plea in a timely manner, or expressed a good faith intention to modify his sentence and had an appreciable chance of success. 533 N.W.2d at 736.

<sup>4</sup>State v. Tomlinson, 2002 WI 91, ¶ 44, 254 Wis. 2d 502, 648 N.W.2d 367 (2002) (although the witness "may not have properly invoked his Fifth Amendment privilege," the trial court could properly find him unavailable because he persistently refused to answer questions).

### § 804.103 Refusal to testify

A witness who refuses to testify may become an “unavailable declarant,” provided the witness persists in refusing to testify despite an order by the court to do so.<sup>1</sup> In short, Wis. Stats. § 908.04(1)(b) contemplates something akin to a battle of wills between the judge and the witness. Generally, this scenario occurs when a witness asserts a privilege, the trial judges rules it inapplicable, and the witness refuses to testify anyway.<sup>2</sup> In an appropriate case, the trial judge may threaten the witness with contempt before declaring the witness unavailable.<sup>3</sup> Although the rule states that the witness’s refusal to testify must come despite an “order” by the court, the authority is divided about whether an actual order must appear in the record. The better course is for the trial court to issue such an order in an effort to prompt the testimony, but the underlying purposes of the rule are served if it is clear from the record that a formal order would have been unavailing. Wisconsin case law is in accord with this position.<sup>4</sup>

#### [Section 804.103]

<sup>1</sup>According to one source, this rule represented a change in Wisconsin law. Wis. Stats. § 908.04 Judicial Council Committee’s Note (“This provision would modify the decision in *Pleau v. State*, 255 Wis. 362, 38 N.W.2d 496 (1949.”). The *Pleau* case was cited as being contrary to this rule in the advisory committee’s note to Fed. R. Evid. 804(a)(2):

A witness is rendered unavailable if he simply refuses to testify concerning the subject matter of his statement despite judicial pressures to do so, a position supported by similar considerations of practicality. *Johnson v. People*, 152 Colo. 586, 384 P.2d 454 (1963); *People v. Pickett*, 339 Mich. 294, 63 N.W.2d 681 (1954). *Pleau v. State*, 255 Wis. 362, 38 N.W.2d 496 (1949).

But see the commentary by the court of appeals in *State v. Peck*, 143 Wis. 2d 624, 422 N.W.2d 160, 168 (Ct. App. 1988) (contending that *Pleau* “does not speak to the fifth amendment privilege or to the concept of unavailability as a condition precedent to the admission of hearsay evidence”).

<sup>2</sup>*State v. Buelow*, 122 Wis. 2d 465, 474, 363 N.W.2d 255, 260 (Ct. App. 1984) (declarant unavailable within meaning of Wis. Stats.

§ 908.04(1)(b) where she refused to testify on Fifth Amendment grounds despite having been granted immunity against prosecution).

<sup>3</sup>See, e.g., *State v. Buelow*, 122 Wis. 2d 465, 363 N.W.2d 255 (Ct. App. 1984).

<sup>4</sup>*State v. Tomlinson*, 2002 WI 91, ¶ 44, 254 Wis. 2d 502, 648 N.W.2d 367 (2002) (the trial court could properly find a witness unavailable because, on tenuous Fifth Amendment grounds, he persistently refused to answer questions despite a court order to do so); *State v. Murillo*, 2001 WI App 11, ¶ 6, 240 Wis. 2d 666, 623 N.W.2d 187 (Ct. App. 2000) (held that the trial court properly admitted the declarant’s statement against social interest, as in his own brother’s murder trial; the record clearly supported the declarant’s unavailability where, before trial, the declarant “was deposed but he refused to testify, asserting his Fifth Amendment right against self-incrimination”; although the State granted him immunity, the declarant still refused to testify and was held in contempt—apparently without effect).

In *State v. Sorenson*, 143 Wis. 2d 226, 242 n.7, 421 N.W.2d 77, 83 n.7 (1988) the supreme court applied the

### § 804.104 Lack of memory

Wis. Stats. § 908.04(1)(c) concerns unavailability and the forgetful witness. A witness's testimony is unavailable whenever she testifies to a lack of memory as to the subject matter of her prior out-of-court statement.<sup>1</sup> The key is that the forgetful witness must appear under oath and testify to the memory lapse; it cannot be asserted by a representative or a third party (although other types of unavailability may well apply). In essence, the issue is whether the out-of-court statement may be admitted under one of the Wis. Stats. § 908.045 exceptions to fill the evidentiary gap created by the witness' memory lapse. Other hearsay exceptions may also be considered. A "forgetful" witness's prior statements may be introduced as prior statements under Wis. Stats. § 908.01(4) or as past recollection recorded under Wis. Stats. § 908.03(5).<sup>2</sup>

The "forgetfulness" implicated in subsection (1)(c) is a lack of

residual exception to the hearsay rule located at Wis. Stats. § 908.045(6). It also found that the declarant, a young child, was unavailable to testify despite the omission by the trial judge to enter a specific order. The court observed:

Under [Wis. Stats. § 908.04(1)(b)], a declarant must persist in refusing to testify despite an order of the judge to do so. The record shows that no order was made in this case because the judge determined it was futile in light of L.S.'s young age. We will treat L.S. as "unavailable" for the purposes of our analysis despite this omission because the court made adequate findings, supported by the record, of the prosecutor's good faith demonstration of L.S.'s unavailability when she refused to testify at the preliminary hearing. (Citations omitted.)

#### [Section 804.104]

<sup>1</sup>State v. Jenkins, 168 Wis. 2d 175, 483 N.W.2d 262 (Ct. App. 1992) (seven-year-old boy unavailable where he was called as a witness and testified to his inability to recall events surrounding the shooting of his mother when he was three years old).

Wis. Stats. § 908.04(1)(c) Judicial Council Committee's Note ("Although no Wisconsin case has expressed this doctrine as an unavailability basis for a hearsay

effect of Wis. Stats. § 804.104

exception, the rule is consistent with the rationale in *Schemenauer v. Travers Indem. Co.*, 34 Wis. 2d 299, 301, 149 N.W.2d 644, 648 (1967), where plaintiff's claim of amnesia was under attack. The court held that such circumstance was within the ambit of conduct by silence and justified the absent available witness instruction because it made his cross-examination unavailable to the defendants.").

<sup>2</sup>See Fed. R. Evid. 804(a)(3) advisory committee's note:

The position that claimed lack of memory by the witness of the subject matter of his statement constitutes unavailability likewise finds support in the cases, though not without dissent. [citation omitted] If the claim is successful, the practical effect is to put the testimony beyond reach, as in the other instances. In this instance, however, it will be noted that the lack of memory must be established by the testimony of the witness himself, which clearly contemplates his production and subjection to cross-examination.

<sup>2</sup>See U.S. v. Owens, 484 U.S. 5562-65, 108 S. Ct. 838, 844-45, 98 L. Ed. 2d 951, 24 Fed. R. Evid. Serv. 19 (1988) (extensive discussion of lapse of memory in light of Fed. R. Evid. 801(c)(1)(C) and Fed. R. Evid. 804(a)(3)). The Supreme Court observed that a witness can be "subject to cross examination" concerning a prior state-

memory concerning the matters asserted in the hearsay statement.<sup>3</sup> The declarant must testify as a witness regarding the lack of memory.<sup>4</sup> Where the witness's lack of memory is caused by severe mental illness (e.g., dementia), unavailability may also be found under Wis. Stats. § 908.04(1)(d), which obviates the need to physically produce the declarant in court.<sup>5</sup>

“Lack of memory” is a preliminary question of fact for the judge to determine under Wis. Stats. § 901.04(1). The judge determines all issues of fact and law by a preponderance of the evidence. Thus, credibility determinations are for the judge, including any issue of whether the lack of recollection is genuine or feigned (a distinction not compelled by the rule).<sup>6</sup> Because the rules of evidence are inapplicable in such hearings, the judge may rely on hearsay (e.g., an expert's report).

Admissibility issues aside, a witness' assertion of forgetfulness may also affect the witness's credibility for purposes of evaluating the weight of the evidence. A genuine lapse may call into question other aspects of the witness' testimony or her capacity to testify. A suspected, feigned forgetfulness is relevant to the witness' sincerity. Thus, the “forgetfulness” may also be put before the jury even where the judge finds the witness' testimony unavailable under this provision.<sup>7</sup>

### § 804.105 Death, illness, and infirmity

Wis. Stats. § 908.04(1)(d) concerns declarants who are physically or psychologically “unavailable” to testify. The rule excuses the declarant's testimony and even his or her presence in court in the event of death (unsurprising) or because of a then existing physical or mental illness or infirmity. All issues of fact and law

under Fed. R. Evid. 801(d)(1) but “unavailable” under Fed. R. Evid. 804(a)(3) at the same time. The Court was unperplexed by this “verbal curiosity.” 484 U.S. at 844–845, 108 S.Ct. at 561–565.

<sup>3</sup>*United States v. Owens*, 484 U.S. at 561, 108 S.Ct. at 844 (Congress' intent was that Fed. R. Evid. 804(a)(3) address a “recurrent evidentiary problem at issue here—witness forgetfulness of an underlying event . . .”).

<sup>4</sup>See Fed. R. Evid. 804(a)(3) Advisory Committee's Note (quoted above).

<sup>5</sup>*Kluever by Gonring v. Evangelical Reformed Immanuel Congregation*, 143 Wis. 2d 806, 422 N.W.2d 874, 876 (Ct. App. 1988) (where by the time of trial the declarant had degenerated

into what was described as a “very primitive, very vegetative level”).

<sup>6</sup>Report of House Committee on the Judiciary (“Rule 804(a)(3) was approved in the form submitted by the Court. However, the Committee intends no change in existing federal law under which the court may choose to disbelieve the declarant's testimony as to his lack of memory. See *U.S. v. Insana*, 423 F.2d 1165, 1169–70 (2d Cir. 1970).”).

<sup>7</sup>In effect, this is impeachment of a hearsay declarant. See Wis. Stats. § 908.06. See also *United States v. Owens*, 484 U.S. at 556–558, 108 S.Ct. at 842–45 (pointing out that a witness's lapse of memory is often the goal of the cross-examiner).

are for the judge to decide in accordance with Wis. Stats. § 901.04(1).<sup>1</sup>

Unavailability because of death is obvious.<sup>2</sup> The circumstances surrounding the death are immaterial to the issue of unavailability to testify.<sup>3</sup> More troublesome is unavailability because of a then existing physical or mental illness or infirmity. In criminal cases this issue is often entangled in considerations relating to the confrontation right, which may require the prosecution to make a good faith effort to produce the declarant in the courtroom.<sup>4</sup> A badly brain damaged declarant who will never be able to present meaningful testimony is a simple if tragic illustration of unavailability.<sup>5</sup> Beyond this, the courts are forced to grapple with two difficult issues: what is meant by a "physical or mental illness or infirmity" and what temporal limitations apply to the "then existing" requirement?

The physical or mental illness or infirmity must be of such severity that the witness cannot reasonably be expected to appear or to testify.<sup>6</sup> The courts include the risk of psychological or emotional trauma.<sup>7</sup> Generally, a sufficient showing will require expert medical or psychological testimony regarding the risk of harm to

**[Section 804.105]**

<sup>1</sup>See § 104.1.

<sup>2</sup>Wis. Stats. § 908.04(1)(d) Judicial Council Committee's Note (death as unavailability was in accord with prior cases concerning statements against interest and former testimony).

<sup>3</sup>See, e.g., *Gordon v. Milwaukee County*, 125 Wis. 2d 62, 370 N.W.2d 803 (Ct. App. 1985) (abrogated on other grounds by, *Kimps v. Hill*, 187 Wis. 2d 508, 523 N.W.2d 281, 95 Ed. Law Rep. 370 (Ct. App. 1994)) (declarant's death brought about by suicide).

<sup>4</sup>Section 802.3.

<sup>5</sup>*Kluever by Gonring v. Evangelical Reformed Immanuel Congregation*, 143 Wis. 2d 806, 422 N.W.2d 874, 876 (Ct. App. 1988) (applying Wis. Stats. § 908.045(2), statements of recent perception, where the declarant by the time of trial was described as having lapsed into a "very primitive, very vegetative level").

<sup>6</sup>A witness who fails to meet the threshold requirement of "minimum credibility" is unavailable to present testimony under Wis. Stats.

§ 908.04(1)(d). See *State v. Smith*, 125 Wis. 2d 111, 127, 370 N.W.2d 827, 834 (Ct. App. 1985), decision rev'd on other grounds, 131 Wis. 2d 220, 388 N.W.2d 601 (1986).

<sup>7</sup>See *Ebert by Krueger v. Kettner*, 151 Wis. 2d 880, 882 n.2, 447 N.W.2d 62, 63 n.2 (Ct. App. 1989) (plaintiffs brought civil action against defendant based upon his sexual assault of a child; the trial court refused to admit the child's prior testimony given during the criminal proceedings because she was not "unavailable" under Wis. Stats. § 908.04(1)(d); affirming, the court of appeals noted that "a sufficiently proven susceptibility to serious psychological harm based upon a prior trauma such as sexual assault constitutes a 'then existing' mental infirmity within the meaning of the statute").

The difficulties of such a determination are seen in *State v. Burns*, 112 Wis. 2d 131, 139, 332 N.W.2d 757, 762 (1983), where the supreme court's determination that the victim was psychologically unavailable was found to be in error by a federal court in a habeas action, *Burns v. Clusen*, 599 F. Supp. 1438, 1446 (E.D. Wis. 1984),

the declarant. The expert proof may be offered in hearsay form because the rules of evidence are not applicable to Wis. Stats. § 901.04(1) determinations. Expert testimony is not required in all cases; for example, where the declarant appears in court and "breaks down" the judge might be sufficiently convinced that the testimony is "unavailable."<sup>8</sup> Ultimately, however, the proponent bears the burden of convincing the judge by a preponderance of the evidence. Fear of testifying or the emotional upset that accompanies testifying are insufficient.<sup>9</sup>

The "then existing" requirement does not demand that the condition be permanent.<sup>10</sup> Wis. Stats. § 908.04(1)(d) represented a change in Wisconsin law, which had previously required a showing that there was no reasonable probability that the witness would ever be able to attend the trial.<sup>11</sup> Although the condition need not be permanent, it should be such that the problem cannot be reasonably overcome by adjourning the trial or taking other precautions.<sup>12</sup> In criminal cases, the confrontation right may supersede the minimal requirements of this provision.

judgment aff'd, 798 F.2d 931, 21 Fed. R. Evid. Serv. 481 (7th Cir. 1986) ("I agree with the Wisconsin Supreme Court dissenters . . . that the majority finding that L.L. suffered from schizophrenia and is a catatonic schizophrenic is against the great weight and clear preponderance of the evidence. At best, Dr. Busby's confusing diagnosis supports a finding of acute schizophreniform disorder, not schizophrenia"). The federal court's decision was based on the confrontation right, 599 F.Supp. at 1448.

<sup>8</sup>State v. Drusch, 139 Wis. 2d 312, 319, 407 N.W.2d 328, 331 (Ct. App. 1987) ("Nor do we believe expert medical testimony is essential to the determination. While some of the cases cited by Drusch involved medical testimony as to the witnesses' incapacity, none held that such testimony is required, and all are distinguishable.").

<sup>9</sup>See State v. Gollon, 115 Wis. 2d 592, 601, 340 N.W.2d 912, 916 (Ct. App. 1983) (mother's testimony that child was too afraid to testify was insufficient).

<sup>10</sup>State v. Drusch, 139 Wis. 2d 312, 318, 407 N.W.2d 328, 331 (Ct. App. 1987) ("[Wis. Stats. § 908.04(1)(d)] does not require per-

manent testimonial incapacity in order for prior testimony to be admitted into evidence").

<sup>11</sup>Wis. Stats. § 908.04(1)(d) Judicial Council Committee's Note:

In *Markowitz v. Milwaukee Elec. Ry. & Light Co.*, 230 Wis. 312, 316, 284 N.W. 31, 33 (1939) relying upon *Spencer v. State*, 132 Wis. 509, 512, 112 N.W. 462, 463 (1907), it was held that a witness must be in such a state, mentally or physically, or both, that in all reasonable probability he would never be able to attend a trial. It was also held that medical testimony that the witness was not capable "at the present time" of giving testimony did not establish unavailability. Note that *Markowitz* was a civil case but relied upon a statement in *Spencer*, a criminal case, where the decision was predicated upon an interpretation of the confrontation clause of the Wisconsin Constitution. The rule in *Markowitz* is changed by this provision to permit "present" unavailability to satisfy the rule.

<sup>12</sup>State v. Drusch, 139 Wis. 2d 312, 318, 407 N.W.2d 328, 331 (Ct. App. 1987) (trial court's finding that a continuance was not practical where the child declarant had "broken down" emotionally on the stand, and was thus unavailable to testify, was not

**§ 804.106 "Psychological scarring"**

In criminal cases involving children, the declarant's unavailability can arise if the judge finds that testifying might "psychologically scar" the child. Although this finding is most likely to occur where the child is a crime victim, the cases do not restrict its application to crime victims.<sup>1</sup>

**§ 804.107 Absence from the hearing or trial**

A declarant who is not in court despite the proponent's effort to procure the declarant's presence by process or other reasonable means is unavailable. Wis. Stats. § 908.04(1)(e) expanded Wisconsin law by including "temporary" absences as well as situations in which it appears that there is no reasonable likelihood that the declarant will ever be produced.<sup>2</sup> The "reasonable means" standard of the rule apparently incorporates the "good faith, " "due diligence" test which also applies to the right of the criminal defendant to confront his accusers.<sup>2</sup>

Wis. Stats. § 908.04(1)(e) differs from its federal counterpart

clearly erroneous).

**[Section 804.106]**

<sup>1</sup>State v. Petrovic, 224 Wis. 2d 477, 592 N.W.2d 238, 242 (Ct. App. 1999) (forcing a five-year old girl to testify against her mother in a drug prosecution "is an exigency sufficiently similar to forcing a child sexual assault victim to testify").

**[Section 804.107]**

<sup>1</sup>Judicial Council Committee's Note to Wis. Stats. § 908.04(1)(e):

Wisconsin law equates absence with unavailability as a satisfaction of the necessity aspect of hearsay. [Wis. Stats. § 885.31] applies to the former testimony exception and *Dillenberg v. Carroll*, 259 Wis. 417, 422, 49 N.W.2d 444, 446 (1951) refers to absence in a statement against interest exception. In *Dillenberg*, where the declarant was deceased, the court broadly stated the rule of unavailability of a witness as "died, became insane, or for some other reason is not available as a witness." § 885.31 is "declaratory of the common-law rule generally adopted on that subject." *Estate of Sweeney*, 248 Wis. 607, 614, 22 N.W.2d 657, rehearing denied 248 Wis. 607, 24 N.W.2d 406, 407 (1946). The statute refers to absence from the state and temporary absence may not satisfy the statute, *State v. Anderson*, 219 Wis. 623, 629,

263 N.W. 587, 589 (1935); [Wis. Stats. § 908.04] refers only to absence from the hearing and this is a change in Wisconsin law.

<sup>2</sup>See § 802.3. See also Judicial Council Committee's Note to Wis. Stats. § 908.04(1)(e) (citation omitted):

Diligent attempts to procure attendance of the witness as a condition to invoking the concept of unavailability have been required by Wisconsin cases whether considered a confrontation matter in a criminal case or a former testimony exception to the hearsay rule in civil cases. . . . The provision of this section that the proponent of the hearsay statements referred to in this section must establish his inability to procure the declarant's attendance "by process or other reasonable means" is not believed to be any departure from the "good faith effort" [required by prior cases] or the need to specify the facts showing diligence rather than a mere assertion or perfunctory showing of some diligence . . .

See *State v. Zellmer*, 100 Wis. 2d 136, 301 N.W.2d 209 (1981), where the court quoted with approval from the Judicial Council Committee's Note. It held that the actual use of process is not essential in every case to a determination of unavailability under this rule, but that the prosecutor erred by

Unlike the Wisconsin rule, current Fed. R. Evid. 804(a)(5) distinguishes between two scenarios involving a failure of process: it predicates use of the former testimony and forfeiture by wrongdoing exceptions on a showing that the declarant's "attendance" is not reasonably possible, and the remaining Fed. R. Evid. 804(b) exceptions on the unavailability of the declarant's attendance or testimony. Neither condition applies if the statement's proponent "procured" the declarant's unavailability.

### § 804.108 Unavailability resulting from wrongdoing

Wis. Stats. § 908.045(2) sets forth a rule of estoppel (of sorts) regarding the declarant's unavailability where the *proponent* has contributed to or created the problem. It provides that a declarant is not "unavailable" as a witness where the exemption, refusal, claim of forgetfulness, mental or physical inability, or absence is "due to" the procurement or wrongdoing of the proponent for the purpose of preventing the witness from attending or testifying.<sup>1</sup> Essentially, then, this provision precludes the proponent from offering an absent declarant's statement under any of the § 908.045 exceptions.

The cases are unfortunately ripe with extreme examples, such as bribery, subornation of perjury, threats, intimidation, and murder of potential witnesses. The inclusion of the term "procurement" along with "wrongdoing" indicates that this rule is not limited to instances of misconduct or even bad faith.<sup>2</sup> These issues are preliminary questions of admissibility for the trial judge

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failing to use the Uniform Act for the Extradition of Witnesses in Criminal Actions to secure the attendance of a recalcitrant physician whose whereabouts were known to the prosecution. This omission violated both the hearsay rule and the defendant's confrontation right. The error was found to be harmless. See also *La Barge v. State*, 74 Wis. 2d 327, 336, 246 N.W.2d 794, 798 (1976) (quoting Judicial Council Committee's Note to Wis. Stats. § 908.04(1)(e) with approval; reasonable diligence exercised where one month before trial the prosecution began efforts to extradite a recalcitrant witness from Cook County, the subject failed to show up for a hearing in Illinois and a warrant was then issued for her arrest).

#### [Section 804.108]

<sup>1</sup>State v. Frambs, 157 Wis. 2d 700, 460 N.W.2d 811, 813 (Ct. App.

1990) (trial court properly found that declarant's unavailability was as a result of threats against the declarant by defendant).

<sup>2</sup>For an example of the difficult situation that arises where a party advises or counsels a witness with regard to the exercise of a privilege, see *Pleau v. State*, 255 Wis. 362, 38 N.W.2d 496 (1949). It should be observed that in *Pleau* the party counseling the witness about the privilege was not the proponent of the evidence.

See, e.g., *U.S. v. Dolah*, 245 F.3d 98, 103 (2d Cir. 2001) (abrogated on other grounds by, *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177, 63 Fed. R. Evid. Serv. 1077 (2004)) (no "wrongdoing" in the Government's decision to immunize some accomplices and not others; non-immunized accomplices who would not testify on the defendant's behalf "made their own

to decide by a preponderance of the evidence.<sup>3</sup> The rule is similar to Fed. R. Evid. 804(a)(5), discussed above.

### § 908.045 HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

**(1) Former testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross-, or redirect examination, with motive and interest similar to those of the party against whom now offered.

**(2) Statement of recent perception.** A statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which the declarant was interested, and while the declarant's recollection was clear.

**(3) Statement under belief of impending death.** A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death.

**(4) Statement against interest.** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborated.

decisions": "Although the Appellants suggest that a prosecutor has some opportunity to manipulate co-defendants' sentencing dates to make sure that the risk of self-incrimination at sentencing remains at the time of another defendant's trial, there is nothing in the record to indicate such tactics in this case."

<sup>3</sup>State v. Frambs, 157 Wis. 2d

700, 460 N.W.2d 811 (Ct. App. 1990) (also holding that defendant's right to confrontation did not apply to the use of hearsay by the judge, pursuant to Wis. Stats. § 901.04(1), to determine a preliminary question of admissibility—whether defendant procured the absence of the declarant whose statement he sought to introduce).

**(5) Statement of personal or family history of declarant.** A statement concerning the declarant's own birth, adoption, marriage, divorce, relationship by blood, adoption or marriage, ancestry, whether the person is a marital or nonmarital child, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated.

**(5m) Statement of personal or family history of person other than the declarant.** A statement concerning the birth, adoption, marriage, divorce, relationship by blood, adoption or marriage, ancestry, whether the person is a marital or nonmarital child, or other similar fact of personal or family history and death of a person other than the declarant, if the declarant was related to the other person by blood, adoption or marriage or was so intimately associated with the other person's family as to be likely to have accurate information concerning the matter declared.

**(6) Other exceptions.** A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

(S.Ct. Order, 59 Wis.2d R1, R308; 1975 Wis. Acts c. 94, s. 91(12), and c. 199; 1983 Wis. Act c. 447; 1991 Wis. Act 32 1999 Wis. Act c. 85)

#### AUTHOR'S COMMENTS

##### § 8045.0 General considerations

##### § 8045.0 General considerations

Wis. Stats. § 908.045 embraces sundry hearsay exceptions that are predicated upon a showing of the declarant's unavailability. Unavailability is determined by reference to Wis. Stats. § 908.04. The categories of unavailability may be used in any combination with the exceptions under Wis. Stats. § 908.045. The policy underlying the exceptions is an ad hoc mixture of reliability and need; that is, hearsay falling within these rules is reliable enough to use when the evidence is otherwise unavailable.

Whatever the theoretical justifications, the rules generally follow the common law antecedents. The major differences are the residual exception and the statement of recent perception, Wis. Stats. § 908.045(2). The latter exception was rejected by Congress and has been adopted in only a few jurisdictions.<sup>1</sup>

##### § 908.045(1) FORMER TESTIMONY

The following are not excluded by the hearsay rule if the declar-

[Section 8045.0]

<sup>1</sup>See § 8045.2.

ant is unavailable as a witness:

**(1) Former testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross-, or redirect examination, with motive and interest similar to those of the party against whom now offered.

### AUTHOR'S COMMENTS

#### § 8045.1 Former testimony

##### § 8045.1 Former testimony

Transcripts of depositions and testimony taken at an earlier trial or proceeding are quintessential hearsay when used to prove the matters (facts, conditions, opinions) asserted. Despite its testimonial trappings, the declarant provided the earlier testimony "other than while testifying" at the trial or hearing currently underway.<sup>1</sup> The statements contained in the transcript may be offered for their truth under any applicable exception or exemption. Trial lawyers frequently offer "prior testimony" as inconsistent statements, consistent statements, or past recollection recorded, to name a few examples.<sup>2</sup> In short, transcripts of prior testimony are not restricted to the former testimony exception.

The former testimony exception represents one of the most reliable forms of hearsay. Former testimony consists of statements made under oath in an adversary contest. Thus, the written transcript assures narrative accuracy, the oath provides some guarantee of the declarant's sincerity, and adversary questioning probes the reliability of the declarant's perceptions and memory. The only missing procedural component is the opportunity to observe the declarant's demeanor *while* testifying, but even this concern may be addressed by a video or digital recording.<sup>3</sup>

Despite its reliability, the admissibility of former testimony

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##### [Section 8045.1]

<sup>1</sup>Wis. Stats. § 908.01(3).

<sup>2</sup>McCormick on Evidence § 301 (7th ed.).

<sup>3</sup>Fed. R. Evid. 804(b)(1) advisory committee's note:

Former testimony does not rely upon some set of circumstances to substitute for oath and cross-examination, since both oath and opportunity to cross-examine were present in fact. The only missing one of the ideal conditions for the giving of testimony is the presence

of trier and opponent ("demeanor evidence"). This is lacking with all hearsay exceptions. Hence it may be argued that former testimony is the strongest hearsay and should be included under [Fed. R. Evid. 803], *supra*. However, opportunity to observe demeanor is what in a large measure confers depth and meaning upon oath and cross-examination. Thus in cases under Rule 803 demeanor lacks the significance which it possesses with respect to testimony. In any event, the tradition, founded in experience, uniformly favors production of the witness

under Wis. Stats. § 908.045(1), as at common law, requires a showing of the declarant's unavailability.<sup>4</sup> The unavailability requirement reflects the venerable preference for live, in-court testimony by witnesses. (We like our testimony "fresh.")

There is no mandated method for proving the content of a declarant's former testimony. When no transcript is available, a witness may testify to her recollection of testimony (hers or others) at the prior trial or hearing. A certified copy of the transcribed testimony is the method preferred by most lawyers since it obviates most issues about exactly what was said at the earlier proceeding.<sup>5</sup> The proponent must authenticate the transcript, which is usually received into evidence as an exhibit. Publication to the jury is often accomplished by reading the transcribed testimony into the record at the current proceeding. Again, no rules rigidly regulate the proof process. A short passage may be read to the jury by the proponent, who reads both the "Q&A." Longer transcripts may be acted out by having the proponent read the questions while another person reads the role of the witness. The method rests within the trial judge's sound discretion. See Wis. Stats. § 906.11 (judge's power to control the "mode" of presenting evidence).

Wis. Stats. § 908.045(1) is identical to the version of the rule submitted by the Supreme Court to Congress. As explained below, Congress changed the rule but later federal court interpretations of Fed. R. Evid. 804(b)(1) have minimized any differences between the rule enacted by Congress and the version originally proposed by the Court.

The rule applies only to "testimony" given by the declarant as a witness. The testimony may have been given at another hearing of the same or a different proceeding. For example, in a civil case the declarant may have testified earlier at an evidentiary hearing on a request for a preliminary injunction. Or when a new trial is granted for whatever reason, testimony taken at the first trial is generic hearsay when offered at the second trial; thus a witness's testimony in the first trial must fall under the former testimony exception, if not under some other exception or exemption. In

if he is available. The exception indicates continuation of the policy. This preference for the presence of the witness is apparent also in rules and statutes on the use of depositions, which deal with substantially the same problem.

<sup>4</sup>See Wis. Stats. § 908.045(1) Judicial Council Committee's Note ("This rule is a minor change in Wisconsin law. In *Feldstein v. Harrington*, 4 Wis.

2d 380, 90 N.W.2d 566 (1958), §§ 885.31 and 887.17 were considered. Section 885.31 has been described as declaratory of the common law in *In re Sweeney's Estate*, 248 Wis. 607, 22 N.W.2d 657 (1946). In *Feldstein* the need for identity of parties was eliminated as 'only an incident or corollary of substantial identity of issue.'")

<sup>5</sup>McCormick on Evidence § 307 (7th ed.).

criminal cases, the former testimony frequently involves testimony given at a preliminary examination or at a suppression hearing.<sup>6</sup> The testimony need not have been part of the present litigation. The rule plainly allows for testimony given during the course of a *different* case, as when separate litigation results from a single event, provided the other elements are satisfied. For example, testimony given by a witness in a coverage dispute between an insurer and its insured may qualify under this exception in later litigation between the tortfeasor (insured) and the injured plaintiff.

Depositions may also qualify as former testimony. Wis. Stats. § 908.045(1) refers, however, only to depositions taken in compliance with the law during the course of *another* proceeding. This contrasts with the immediately preceding language in the rule that embraces testimony given at another hearing of the same or a different proceeding.<sup>7</sup> It appears then that the admissibility of depositions taken during the *same* case is controlled by the rules of civil procedure and other hearsay exceptions (e.g., prior inconsistent statements).<sup>8</sup>

Testimony is chiefly characterized by an oath and an opportunity to examine the witness. Former testimony does not include *ex parte* affidavits or testimony before a grand jury and John Doe proceeding because there is no adversarial element to these procedures.<sup>9</sup> The rule demands that the opposing parties must have had an opportunity to examine the witness. Direct and redirect examination are functionally equivalent to cross-examination: each presents counsel with the opportunity to develop the witness' testimony. In criminal cases, the court has upheld the use of this exception where a criminal defense lawyer "strategically" waived an earlier opportunity to cross-examine a

<sup>6</sup>McCormick on Evidence § 302 (7th ed.).

<sup>7</sup>Fed. R. Evid. 804(b)(1) specifically provides that both prior hearing testimony and deposition testimony may have been given during the course of the same or a "different" proceeding.

<sup>8</sup>See Wis. Stats. § 804.07(1).

<sup>9</sup>Voith v. Buser, 83 Wis. 2d 540, 547-48, 266 N.W.2d 304, 307-08 (1978). For a fuller discussion, see §§ 802.3 to 802.4 (regarding depositions as evidence in civil and criminal cases).

<sup>9</sup>See McCormick on Evidence § 305 (7th ed.) ("If the accepted requirements of an oath, adequate opportunity to cross-examine on substantially the same issue, and present unavailability of the witness are satisfied, then the character of the tribunal and the form of the proceedings are immaterial and the former testimony should be received.").

Wisconsin criminal practice relies almost exclusively on John Doe investigations, not grand juries, as provided by Wis. Stats. § 968.26, which permits no adversarial examination.

declarant who was later unavailable to testify.<sup>10</sup> In short, it is the opportunity that counts more than the conduct of the examination itself.

The heart of the former testimony exception is the requirement that the testimony must have been taken at the instance of, or against a party with, motive and interest similar to those of the party *against whom* the testimony is now offered. The federal advisory committee explained:

Under the exception, the testimony may be offered (1) against the party *against whom* it was previously offered or (2) against the party *by whom* it was previously offered. In each instance the question resolves itself into whether fairness allows imposing, upon the party *against whom* now offered, the handling of the witness on the earlier occasion.<sup>11</sup>

The advisory committee illustrated the most straightforward applications of the rule. But this exception does not require identity of parties with respect to the prior and present proceedings. Nor must "privity" exist between a former party and the party *against whom* the testimony is now offered.<sup>12</sup>

The key concern, then, is whether the motives and interests are sufficiently similar at the respective hearings; the party *against whom* the testimony is now offered need not have been a

<sup>10</sup>State v. Bauer, 109 Wis. 2d 204, 220 n.11, 325 N.W.2d 857, 865 n.11, 38 A.L.R.4th 362 (1982). See McCormick on Evidence § 302 (7th ed.).

<sup>11</sup>Fed. R. Evid. 804(b)(1) advisory committee's note (emphasis original) (citations omitted). The Committee's Note continued:

(1) If the party *against whom* now offered is the one *against whom* the testimony was offered previously, no unfairness is apparent in requiring him to accept his own prior conduct of cross-examination or decision not to cross-examine. Only demeanor has been lost, and that is inherent in the situation. (2) If the party *against whom* now offered is the one *by whom* the testimony was offered previously, a satisfactory answer becomes somewhat more difficult . . . A more direct and acceptable approach is simply to recognize direct and redirect examination of one's own witness as the equivalent of cross-examining an opponent's witness. Allowable techniques for dealing with hostile, double-crossing, forgetful, and

mentally deficient witnesses leave no substance to a claim that one could not adequately develop his own witness at the former hearing. An even less appealing argument is presented when failure to develop fully was the result of a deliberate choice.

<sup>12</sup>Fed. R. Evid. 804(b)(1) advisory committee's note (citations omitted):

As a further assurance of fairness in thrusting upon a party the prior handling of the witness, the common law also insisted upon identity of parties, deviating only to the extent of allowing substitution of successors in a narrowly construed privity. Mutuality as an aspect of identity is now generally discredited, and the requirement of identity of the offering party disappears except as it might affect motive to develop the testimony. The question remains whether strict identity, or privity, should continue as a requirement with respect to the party *against whom* offered.

party to the action at which the testimony was originally taken.<sup>13</sup> The similarity of the motives and interests of the parties developing the testimony is largely a function of the similarity of the issues at the hearings, despite occasional disclaimers to the contrary. On its face the rule does not require that the issues be "substantially similar," but practically this will be the most telling standard by which to judge the similarity of motives, which includes considerations of trial strategy.<sup>14</sup> Although the ultimate

<sup>13</sup>See *U.S. v. Salerno*, 505 U.S. 317, 319-25, 112 S. Ct. 2503, 2506-09, 120 L. Ed. 2d 255, 84 Fed. R. Evid. Serv. 865 (1992), where defendants charged with racketeering-related offenses called several witnesses at trial to testify in their defense. The witnesses claimed the Fifth Amendment privilege against self-incrimination; the defendants then asked the trial court to admit the transcript of the witnesses' testimony given at a grand jury proceeding under Fed. R. Evid. 804(b)(1), the former testimony exception. Both witnesses testified under a grant of immunity at the grand jury hearing. The trial court excluded the evidence, agreeing with the prosecution that the government lacked a "similar motive" during the grand jury proceedings to cross-examine the witnesses in the same way it would at trial. The court noted that the "motive of a prosecutor in questioning a witness before the grand jury in the investigating stages of a case is far different from the motive of a prosecutor in conducting a trial." The court of appeals reversed, finding that the similar motive requirement "evaporated" when the government granted the witnesses immunity to testify at the grand jury.

The Supreme Court agreed with the trial court's interpretation of the rule and reversed the court of appeals. The Court rejected the defendants' arguments that the "similar motive" element did not apply in this case, refusing to create any "exceptions" to the requirement grounded in "adversarial fairness" or other considerations: "Nothing in the language of Rule 804(b)(1) suggests that a court may

admit former testimony absent satisfaction of each of the Rule's elements."

The Court concluded that Congress intended the similar motive element to apply to all hearsay offered under this exception, refusing to "alter evidentiary rules merely because litigants might prefer different rules in a particular class of cases."

<sup>14</sup>McCormick on Evidence § 304 (7th ed.) (asserting that a "'substantial' identity of issues" suffices: "While occasionally stated as a requirement that the issue in the two suits must be the same, the policy underlying this exception does not require that all the issues (any more than all the parties) in the two proceedings must be the same. At most, the issue on which the testimony was offered in the first suit must be the same as the issue upon which it is offered in the second. Additional issues or differences with regard to issues upon which the former testimony is offered are of no consequence.") (note omitted).

Wis. Stats. § 908.045(1) Judicial Council Committee's Note ("Substantial identity of issue (§ 885.31) was held to be a basis for ascertaining that the person against whom the evidence was offered had a similar interest and motive in his opportunity for cross-examination. Thus, the elimination of substantial identity of issue from [Wis. Stats. § 908.045(1)] is more a change of language than substance. The underlying question is similar interest and motive—substantial identity of issue, while not compelled, continues to be one of the incidents or corollaries to ascertaining the requisite interest and motive.") (citations omitted).

Fed. R. Evid. 804(b)(1) advisory

issues in the pleadings will be a useful guidepost, the courts have wisely looked beyond the formal issues and at the substance of the testimony.<sup>15</sup>

For example, following a mishap there may be a dispute between an insured and the insurer about whether coverage exists (e.g., an intentional harm exclusion may preclude coverage). Testimony may be taken about how the injury occurred and whether the act was negligent or intentional. In a later trial on claims brought by the injured plaintiff against the tortfeasor, the former testimony exception may be used to admit the transcribed testimony of a witness from the first trial (insured/insurer) who is unavailable to testify in the second lawsuit (plaintiff/tortfeasor).<sup>16</sup> A simple application occurs where the witness was called by the insured in the first trial and her testimony is used against the insured in the second case. And where the insurance company called the witness in the first trial, it seems likely that the insured/tortfeasor had similar motives to develop the witness's testimony in both trials.

The substantial similarity standard is an appropriate guidepost if not dogmatically applied, since the alternative may be the loss of all evidence. Moreover, the party against whom the former testimony is offered is free to impeach the declarant pursuant to Wis. Stats. § 908.06.

Fed. R. Evid. 804(b)(1) is worded differently than the Wisconsin former testimony exception. It currently states:

(1) **Former Testimony.** Testimony that:

- (A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and
- (B) is now offered against a party who had—or, in a civil case, whose predecessor in interest had—an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

The “predecessor in interest” qualification appears to limit the application of this exception in civil cases to a narrow range of

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committee's note:

The common law did not limit the admissibility of former testimony to that given in an earlier trial of the same case, although it did require identity of issues as a means of insuring that the former handling of the witness was the equivalent of what would now be done if the opportunity were presented. Modern decisions reduce the requirement to “substantial” identity. McCormick Sec. 233. Since identity of issues is significant only in that it bears on motive and interest in developing fully the testimony of the wit-

ness, expressing the matter in the latter terms is preferable.

<sup>15</sup>See *State v. Bauer*, 109 Wis. 2d 204, 221–22, 325 N.W.2d 857, 866, 38 A.L.R.4th 362 (1982).

<sup>16</sup>Criminal cases predating *Crawford v. Washington* (2004), see § 802.3, often allowed the admissibility of preliminary examination testimony against the defendant at trial. Their authority is tenuous in light of post-2004 changes in the law.

substituted parties; i.e., against parties who were not originally parties to the action when the testimony was taken. The federal courts, however, have taken divergent approaches to the interpretation of this language, the end result being that in civil cases Fed. R. Evid. 804(b)(1) functions very much like the Supreme Court's version of the rule.<sup>17</sup>

### § 908.045(2) STATEMENT OF RECENT PERCEPTION

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

\* \* \*

**(2) Statement of recent perception.** A statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which the declarant was interested, and while the declarant's recollection was clear.

### AUTHOR'S COMMENTS

§ 8045.2 Statement of recent perception

### § 8045.2 Statement of recent perception

Wisconsin is one of a small number of jurisdictions that have adopted the exception contained in Wis. Stats. § 908.045(2) for statements of recent perception.<sup>1</sup> The rule had its genesis in earlier efforts which were directed along similar lines, but none

<sup>17</sup>See McCormick on Evidence § 303 (7th ed.) (noting and that the "predecessor in interest language" is one of civil litigation and discussing various approaches by which the federal courts have softened the "predecessor in interest" element such that the rule reads like the original "similar motive and interest" version). See *Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179, 1187, 1979 A.M.C. 49, 3 Fed. R. Evid. Serv. 193, 47 A.L.R. Fed. 874 (3d Cir. 1978) ("While we do not endorse an extravagant interpretation of who or what constitutes a 'predecessor in interest,' we prefer one that is realistically generous over one that is formalistically grudging. We believe that what has been described as 'the practical and expedient view' expresses

the congressional intention: 'if it appears that in the former suit a party having a like motive to cross-examine about the same matters as the present party would have, was accorded an adequate opportunity for such examination, the testimony may be received against the present party.' Under these circumstances, the previous party having like motive to develop the testimony about the same material facts is, in the final analysis, a predecessor in interest to the present party.") (note omitted).

#### [Section 8045.2]

<sup>1</sup>See *Kluever by Gonring v. Evangelical Reformed Immanuel Congregation*, 143 Wis. 2d 806, 422 N.W.2d 874, 877 (Ct. App. 1988).

of these precursors went as far as the present rule.<sup>2</sup> The reception has been decidedly mixed. Although an identical exception was included by the Supreme Court in its draft of the Federal Rules of Evidence, Congress rejected it as "unwarranted" based on concerns about reliability.<sup>3</sup> Its adoption by Wisconsin represented a major change in evidence law.<sup>4</sup>

The court of appeals has explained the policy underlying this controversial hearsay exception:

The exception is based on the premise that probative evidence in the form of a noncontemporaneous, unexcited statement which fails to satisfy the present sense impression or excited utterance exception would otherwise be lost if the recently perceived statement of an unavailable declarant is excluded [citing Comment: The Recent Perception Exception to the Hearsay Rule: A Justifiable Track Record, 1985 Wis. L. Rev. 1525, 1533 (1985)]. The exception's purpose, therefore, is to admit probative evidence which in most cases could not be admitted under other exceptions due to the passage of time, see *id.* at 1543, on the ground that no evidence might otherwise be available [citing Weinstein's Evidence, sec. 804(b)(5) [04] at 197 (1985)]. As such, the exception deals with the problem: "how can a litigant establish his claim or defense if the only witness with knowledge of what occurred is unavailable?"<sup>5</sup>

Although the court explained the need for such hearsay, the same considerations hold true whenever the declarant is unavailable. The more troublesome questions revolve around the reliability of the evidence admitted under this exception.

The exception applies to statements that narrate, describe, or explain an event or condition recently perceived by the declarant. An "event or condition" is discrete and occurs at a distinct place in time and space; a "state of mind" is not included.<sup>6</sup> The statement must have been made in good faith and while the declarant's

<sup>2</sup>Fed. R. Evid. 804(b)(2) (rejected), advisory committee's note (discussing the statutory precursors to this exception).

<sup>3</sup>Report of House Committee on the Judiciary ("The Committee eliminated this Rule as creating a new and unwarranted hearsay exception of great potential breadth. The Committee did not believe that statements of the type referred to bore sufficient guarantees of trustworthiness to justify admissibility.").

<sup>4</sup>Wis. Stats. § 908.045(2) Judicial Council Committee's Note ("This sub. is a major change in Wisconsin law which presently would characterize

the statement as inadmissible hearsay. Note that this provision and all other provisions in this section are conditioned upon the unavailability of the declarant and contain limitations as assurances of accuracy not contained in the comparable provision of the Model Code or Uniform Rules."). The federal advisory committee's note explaining the rule is useful in understanding this exception and is relied upon in this commentary.

<sup>5</sup>Kluever by Gonring v. Evangelical Reformed Immanuel Congregation, 143 Wis. 2d 806, 814, 422 N.W.2d 874, 877 (Ct. App. 1988).

<sup>6</sup>See Tim Torres Enterprises, Inc.

recollection was clear. The exception does not apply if the statement was made in response to the instigation of a person engaged in investigating, litigating, or settling a claim, or if it was made in contemplation of pending or anticipated litigation. Corroboration is neither necessary nor sufficient for admissibility, though it is a factor considered by the courts.<sup>7</sup>

This exception, hedged as it is with restrictions, is cumbersome to apply. Moreover, the restrictions mainly focus on the declarant's mental state at the time the statement was made. Yet because the exception is predicated upon a showing of the declarant's unavailability to testify, these rather finely tuned considerations must be inferred from the statement itself and the surrounding circumstances. This is somewhat akin to performing

v. Linscott, 142 Wis. 2d 56, 416 N.W.2d 670, 678 (Ct. App. 1987), holding that a statement regarding the "state of mind" of another person did not describe or explain an "event" and casting doubt on whether this was a "condition" within the meaning of the rule. The hearsay consisted of testimony by a witness that he had met one Gilles at a party and Gilles stated that "Bob Linscott was very unhappy with the whole situation and that I [the witness] could expect something to happen." The court observed that the statement by Gilles reflected nothing more than Linscott's unhappiness over the contractual dispute at issue. Whether one characterizes this as an "event" or "condition," the facts did not indicate when Linscott spoke with Gilles, thus failing to show that it had been "recently perceived." 416 N.W.2d at 679.

<sup>7</sup>State v. Weed, 2003 WI 85, ¶ 21 n.6, 263 Wis. 2d 434, 666 N.W.2d 485 (2003) (although not overruling State v. Stevens (below), the supreme court clarified that admissibility turns on the "three criteria" set forth in the rule: "corroboration in and of itself does not determine the admissibility of a hearsay statement under the recent perception exception").

State v. Ballos, 230 Wis. 2d 495, 602 N.W.2d 117, 123 (Ct. App. 1999) (911 calls describing a burning building and a man "on fire"; held that the calls were sufficiently "spontaneous" and were made in good faith).

See also State v. Stevens, 171 Wis. 2d 106, 490 N.W.2d 753 (Ct. App. 1992), where in an arson and burglary prosecution the state offered statements made by the defendant's stepdaughter to her friend, the state's witness. The witness testified that one day, while walking home from school, the stepdaughter said that on that previous evening the defendant had admitted he had stolen some stereo equipment. The witness also testified that about one month after this conversation she observed stereo equipment in the defendant's home. The stepdaughter was found dead about three months after the conversation; the witness then reported it to police. The trial court admitted the statement under Wis. Stats. § 908.045(4) because the statement subjected the stepdaughter to hatred, ridicule, etc. The court of appeals rejected the state's argument on appeal that the stepdaughter's statement also fit within the recent perception exception:

We conclude that this exception does not apply to the aural perception of an oral statement privately told to a person. Corroboration is the key to reliability of a statement coming under this exception. *Id.* at 759.

The court did not cite any authority that supported its reasoning. Moreover, the court does not explain where the "corroboration" element originates. The text of the rule contains no reference to corroboration, unlike Wis. Stats. § 908.045(4).

brain surgery on the declarant with a blunt instrument.

For example, statements of recent perception must have been made in "good faith," and not in contemplation of pending or anticipated litigation. The good faith requirement extends only to the declarant, not to the witnesses who heard the statement.<sup>8</sup> Although "good faith" is not defined, the tenor of the rule suggests that it is directed at the motivation for the statement, particularly as it relates to the declarant's incentive to accurately relate the event or condition.<sup>9</sup> It appears that good faith may be equated with an absence of bad faith, which may be the only practical way of showing it in the first place.

Similarly, the "not in contemplation" element may be inferred circumstantially from a consideration of whether a lawsuit has been filed, lawyers have been contacted, and the manner in which the subject matter came up during the conversation in which the statement was made.<sup>10</sup> Underlying the restrictions was a concern

<sup>8</sup>State v. Manuel, 2005 WI 75, ¶¶ 31-32, 281 Wis. 2d 554, 697 N.W.2d 811 (2005) (**quoting the treatise**) (declarant's statements to his girlfriend identifying the defendant as the shooter were properly admitted under the exception for statements of recent perception; the girlfriend did nothing to "instigate" the statements, they were in good faith, and "it is clear that she was in no way investigating, litigating, or settling a claim").

Kluever by Gonring v. Evangelical Reformed Immanuel Congregation, 143 Wis. 2d 806, 422 N.W.2d 874 (Ct. App. 1988).

<sup>9</sup>See State v. Manuel, 2005 WI 75 at ¶¶ 31-32 (**quoting the treatise**) (see above); State v. Weed, 2003 WI 85, ¶ 17, 263 Wis. 2d 434, 666 N.W.2d 485 (2003) (murdered husband's statement to his good friend about having unloaded his gun based on concerns about his wife's stability were made in good faith and admissible in wife's murder prosecution); State v. Kreuser, 91 Wis. 2d 242, 280 N.W.2d 270 (1979) (per curiam) ("Echevarria's statement to Sutkus qualified as an exception to the hearsay rule under [Wis. Stats. § 908.045(2)], a statement of recent perception. Echevarria made the statement while his recollection was clear. In fact, he testified that he had writ-

ten the license number down on a newspaper which he threw away some time after he talked to Sutkus. The statement was made in good faith, and not in contemplation of any litigation in which Echevarria had an interest. The event was recently perceived, because Echevarria testified that he talked to Sutkus within a day after seeing the vehicle. The delay was occasioned by the fact that he did not know Sutkus' telephone number, and had to check at work to find out. Finally, the statement was not made in response to the instigation of a person engaged in investigating, settling or litigating a claim."); West v. State, 74 Wis. 2d 390, 401, 246 N.W.2d 675, 681 (1976) (element of "good faith" lacking where it appeared that declarant was motivated to help his friend, the defendant).

See also State v. Kutz, 2003 WI App 205, ¶ 53, 267 Wis. 2d 531, 671 N.W.2d 660 (Ct. App. 2003) (in light of "the nature and circumstances of these statements," the trial court properly found the declarant made them in good faith despite the defendant/husband's claim that she had "an incentive to disparage her husband to others").

<sup>10</sup>State v. Manuel, 2005 WI 75 at ¶¶ 31-32 (**quoting the treatise**) (see above).

about hearsay "manufactured" for the purpose of litigation.<sup>11</sup> In short, if the declarant made the statement with an eye toward litigation or possible litigation, it does not fall within this exception.

The requirement that the event or condition must have been "recently perceived" has been expansively interpreted. In a case involving a severely brain damaged plaintiff who had periodic "islets of memory," the court held that "mere passage of time" is not controlling and that consideration may be given to injuries or other circumstances which precluded or limited earlier statements about the event or condition. Since the declarant possessed an "amorphous" concept of time, the court found that the event (the fall from a ladder) was "recently perceived in his mind."<sup>12</sup> As

*Kluever by Gonring v. Evangelical Reformed Immanuel Congregation*, 143 Wis. 2d 806, 422 N.W.2d 874 (Ct. App. 1988) (declarant suffered a severe head injury in a fall from a ladder; court found that the good faith and "not in contemplation" elements were satisfied given declarant's mental condition and his limited ability to comprehend verbal communication; the statements regarding how the fall occurred were not made in response to any questions or conversations about the fall, but were uttered spontaneously when "all of a sudden" the declarant started talking).

<sup>11</sup>Fed. R. Evid. 804(b)(2) (rejected) advisory committee's note (citations omitted):

Opposition developed to the Uniform Rule because of its countenancing of the use of statements carefully prepared under the tutelage of lawyers, claim adjusters, or investigators with a view to pending or prospective litigation. To meet this objection, the rule excludes statements made at the instigation of a person engaged in investigating, litigating, or settling a claim. It also incorporates as safeguards the good faith and clarity of recollection required by the Uniform Rule and the exclusion of a statement by a person interested in the litigation provided by the English act.

<sup>12</sup>*Kluever by Gonring v. Evangelical Reformed Immanuel Congregation*, 143 Wis. 2d 806, 422 N.W.2d 874

(Ct. App. 1988), citing Weinstein's Evidence, § 804(b)(5)[04] at 199 (1985).

But see *State v. Weed*, 2003 WI 85, ¶ 18, 263 Wis. 2d 434, 666 N.W.2d 485 (2003), where the court found that this condition had been met despite uncertainty about the length of elapsed time between the event (unloading a gun) and the statement describing it:

Second, Michael's statement described an event—taking the bullets out of the .357—that was recently perceived by Michael. Both Fuerbringer and his son testified that they thought the reason Michael stated that he took the bullets out of the gun was because of Weed's recent suicide attempt. This is a reasonable conclusion based on the testimony that the conversation at the Fuerbringers' cottage became tense when it turned to Weed's recent suicide attempt, and Michael made the statement after Weed attempted to drive after she had been drinking. Weed's attempted suicide occurred on September 4, 1998, and she was released from the hospital on September 9, 1998—just three days before the dinner at the Fuerbringers' cottage. Thus, even though the Fuerbringers could not testify as to the exact date Michael allegedly took the bullets out of the gun, it appears that it would have been within, at the most, eight days.

Justice Bradley's concurring opinion raises and addresses some of the problems addressed in the text, especially the concern that *Kluever* provides no meaningful guideposts for the trial court. *Weed*, Bradley J. concur-

a standard of admissibility, this formulation fails to provide any meaningful yardstick for determining “recent perception.” Nearly any articulated thought meets the test. The holding should be understood as applying only to cases where expert medical testimony supports a finding that the declarant has “islets” of accurate memory.

“Recent memory,” then, should be judged in light of the reasons explaining the gap between the event and the time at which the statement was made. The time period cannot be measured with a stopwatch or calendar, and is not as limited as the “immediately thereafter” requirement of the present sense impression, Wis. Stats. § 908.03(1).<sup>13</sup> Yet the longer the lapse, the greater the risk of mistaken recollection. Moreover, an unexplained gap raises questions about how significant the matter was to the declarant when perceived, which may also affect the accuracy of the recollection and the original perception.<sup>14</sup>

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ring, ¶¶ 66–70, **quoting treatise.**

<sup>13</sup>See § 803.1.

<sup>14</sup>The proper approach was taken in *State v. Kreuser*, 91 Wis. 2d 242, 250, 280 N.W.2d 270, 273 (1979) (per curiam), where the court observed that there was a lapse of about one day between the event observed and the statement in question. The delay was explained by the fact that the declarant had to get the phone number of the person to whom he reported the event. Thus, the delay did not give rise to suspicion of fabrication or self-dealing.

See *State v. Anderson*, 2005 WI 54, ¶ 59 n.11, 280 Wis. 2d 104, 695 N.W.2d 731 (2005) (although the statement was admissible under the residual exception found in § 908.03(24), it failed to meet the elements of the statement of recent perception chiefly because there was insufficient evidence about how much time had elapsed between the statement, which described an earlier attack and threat by the defendant, and the event itself: “Here, while Ellifson’s testimony reveals that Krnak’s statement describes an event and satisfies most of the limiting factors contained in § 908.045(2), her testimony does not indicate when the event Krnak described occurred, other than that it

was her ‘understanding’ that the alleged assault by his son occurred not long ago. As such, there is no basis to conclude that Krnak’s statement was made after ‘recently’ perceiving the event.”); *State v. Knapp*, 2003 WI 121, ¶ 184, 265 Wis. 2d 278, 666 N.W.2d 881 (2003), cert. granted, judgment vacated on other grounds, 542 U.S. 952, 124 S. Ct. 2932, 159 L. Ed. 2d 835 (2004) (“We find no clear error in the circuit court’s determination that the third-party hearsay evidence in item 21(a) of Knapp’s offer of proof comes within the recent perception exception under [Wis. Stats. § 908.045(2)], to the hearsay rule. Farrell’s inability to recall, 12 years after the fact, exactly when Borchardt made the statements to her does not undermine the requirements of the exception. The focus should be on the circumstances when the statement was originally made. Further, the lack of clarity as to timing is almost certainly due to the failure to prosecute this case earlier.”) (notes omitted).

See also *State v. Kutz*, 2003 WI App 205, ¶¶ 51–52, 267 Wis. 2d 531, 671 N.W.2d 660 (Ct. App. 2003) (holding that six different statements were properly admitted under this exception; in each case, the statement was made the “same day, in some cases during or immediately following the

The proponent must also demonstrate that the statement was made when the declarant's recollection was clear, a factor that will often blur with the issue of "recent" perception. In looking at the clearness of recollection, the court will examine the surrounding circumstances and may also consider the content of the statement itself, as expressly permitted by § 901.04(1). In the end, however, it seems unlikely that a statement that has met the other threshold requirements would fail under this one.<sup>15</sup>

### § 908.045(3) STATEMENT UNDER BELIEF OF IMPENDING DEATH

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

\* \* \*

**(3) Statement under belief of impending death.** A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death.

#### AUTHOR'S COMMENTS

§ 8045.3 Statement under belief of impending death

#### § 8045.3 Statement under belief of impending death

The dying declaration exception set forth in Wis. Stats. § 908.045(3) represented a significant expansion of Wisconsin law. Breaking ranks with the common law tradition, dying declarations may be used in any civil or criminal action where relevant and otherwise admissible.<sup>1</sup> The common law restricted its use to homicide prosecutions where the need for the evidence outweighed concerns about its reliability. The rule is founded on "powerful psychological forces" and, for many, deeply held religious beliefs that are assumed to be present at death's

event described").

<sup>15</sup>State v. Weed, 2003 WI 85, ¶ 20, 263 Wis. 2d 434, 666 N.W.2d 485 (2003) (despite evidence that the declarant had "drank a few beers" the court found there was "no indication" that his "recollection was not clear when he made the statement").

#### [Section 8045.3]

<sup>1</sup>Wis. Stats. § 908.045(3) Judicial Council Committee's Note ("This sub. is a change in Wisconsin law which limits a statement under belief of

impending death to information concerning the cause or circumstances of such impending death and to homicide cases. Schabo v. Wolf-Pepper Transportation & Storage Co., 201 Wis. 190, 229 N.W. 549 (1930). Its applicability is expanded to civil cases.")

See also Fed. R. Evid. 804(b)(2) advisory committee's note ("While the common law exception no doubt originated as a result of the exceptional need for the evidence in homicide cases, the theory of admissibility applies equally in civil cases.")

doorway; facing the maw of death, the declarant is less likely to fabricate or even exaggerate during his or her final moments.<sup>2</sup> (The inveterately insincere dying declarant may always be impeached as provided by Wis. Stats. § 908.06.)

Despite the expansion of this exception, it appears that it is used infrequently. In most cases, the circumstances giving rise to a dying declaration also satisfy the excited utterance exception.<sup>3</sup> Use of the latter exception eliminates the potential difficulty of proving that the declarant believed that death was imminent. Indeed it is difficult to conjure a scenario in which a “dying declaration” would not also qualify as an excited utterance.

Recent developments in the law governing the Sixth Amendment right of confrontation, however, has breathed new life into this rule. Dying declarations represents one of the few exceptions under which the prosecution may introduce testimonial hearsay against a defendant irrespective of whether the defendant had a prior opportunity to cross-examine the declarant. See § 802.303. Although the Supreme Court has yet to definitively resolve the issue, the Wisconsin Supreme Court has held that dying declarations are an exception to the confrontation right as construed by *Crawford*. Thus, prosecutors may introduce dying declarations against a defendant even though the latter never had a prior opportunity to cross-examine the unavailable (one assumes) declarant.<sup>4</sup>

The dying declaration exception does not require that the declarant be dead, although usually this is the case.<sup>5</sup> For example, a declarant might suffer a catastrophic injury in car accident, fear he is dying, and describe what occurred before lapsing into a persistent vegetative state because of later complications. Reliability inheres in the declarant’s belief that he is about to die, not in the fact of death.

Wis. Stats. § 908.045(3) manifestly requires that the declarant believed that death was imminent at the time he spoke. The declarant’s state of mind presents an issue of fact for the trial

<sup>2</sup>McCormick on Evidence § 310 (7th ed.).

See Fed. R. Evid. 804(b)(2) advisory committee’s note (“While the original religious justification for the exception may have lost its conviction for some persons over the years, it can scarcely be doubted that powerful psychological pressures are present.”).

<sup>3</sup>See Christensen v. Economy Fire & Cas. Co., 77 Wis. 2d 50, 54, 252

N.W.2d 81, 83 (1977).

<sup>4</sup>State v. Beauchamp, 2011 WI 27, ¶ 5, ¶¶ 16-35, 333 Wis. 2d 1, 796 N.W.2d 780 (2011) (holding that dying declarations are exceptions to the *Crawford* rule for purposes of the constitutional right to confrontation). See § 802.302.

<sup>5</sup>McCormick on Evidence § 310 (7th ed.).

judge pursuant to Wis. Stats. § 901.04(1).<sup>6</sup> The requisite belief may be found in the statement itself or from the circumstances surrounding the declarant's wounds, injuries, and eventual death.<sup>7</sup>

The subject matter of the statement is limited to information concerning the cause or circumstances surrounding the declarant's impending death (or the perception thereof), including the identity of the suspect.<sup>8</sup> The statement may be in "opinion" form.<sup>9</sup> Moreover, the statement may have been given in response to questions put to the declarant.<sup>10</sup> These considerations go to

<sup>6</sup>State v. Owens, 2016 WI App 32, ¶¶ 11-12, 368 Wis. 2d 265, 878 N.W.2d 736 (Ct. App. 2016) (no abuse of discretion in admitting dying gunshot victim's statement as a dying declaration). See § 104.1.

<sup>7</sup>State v. Owens, 2016 WI App 32, ¶¶ 12-13, 368 Wis. 2d 265, 878 N.W.2d 736 (Ct. App. 2016) (dying gun shot victim's statement to police was properly admitted as a dying declaration; police found the victim with a gunshot wound to the chest, pale, gasping for air, and drifting in and out of consciousness; several times the officer "yell[ed]" at him to open his eyes and not die: "We find nothing in the record to suggest that Pinkard did not understand that his injuries were life threatening. Being shot in the chest would cause any rational adult to fear imminent death. The nature of Pinkard's injury itself supports the inference that Pinkard believed he was going to die. This inference is strengthened by the fact that Pinkard was gasping for air, going in and out of consciousness, and that he died while he was en route to the hospital. Although Pinkard did not specifically comment on whether he thought he was going to die, he did not have to. Under the circumstances, it was proper for the circuit court to infer that Pinkard believed he was in danger of dying. Indeed, Kitts reinforced Pinkard's suspicions when he yelled at Pinkard not to die." (citation omitted).

Wis. Stats. § 908.045(3) Judicial Council Committee's Note ("The proponent of the declaration must establish

the foundation that the declarant believed that death was impending, Schlesak v. State, 232 Wis. 510, 519, 287 N.W. 703, 707 (1939); State v. Law, 150 Wis. 313, 321, 136 N.W. 803, 806 (1912); however belief of impending death may be inferred from the fact of death and circumstances such as the nature of the wound, Oehler v. State, 202 Wis. 530, 534, 232 N.W. 866, 868 (1930).")

<sup>8</sup>McCormick on Evidence § 311 (7th ed.) (suggesting that the subject matter may extend to prior threats and the like).

<sup>9</sup>McCormick on Evidence § 313 (7th ed.).

Wis. Stats. § 908.045(3) Judicial Council Committee's Note ("[Implicit in the expansion of this exception to civil cases] is the rejection of the erroneous proposition which originated in a misunderstanding of the first-hand knowledge requirement, that the statement may not contain opinions, and rejection of the limitation that the statement can be offered only in a case where the defendant is charged with the death of the declarant, e.g. heretofore a declaration by a rape victim who died in childbirth was inadmissible in a rape case.").

<sup>10</sup>McCormick on Evidence § 311 (7th ed) ("no blanket limitation against statements in response to questions is generally recognized or appropriate") (note omitted). See also § 803.2. Phifer v. State, 64 Wis. 2d 24, 33, 218 N.W.2d 354, 359 (1974). Since this practice is permitted in cases of excited utterances, it should in principle extend to

weight, not admissibility.

Fed. R. Evid. 804(b)(2) is substantively identical, except that it is limited in criminal cases to homicide charges. It can be used in any civil case where relevant.<sup>11</sup>

#### § 908.045(4) STATEMENT AGAINST INTEREST

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

\* \* \*

**(4) Statement against interest.** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborated.

#### AUTHOR'S COMMENTS

##### § 8045.4 Statement against interest

##### § 8045.4 Statement against interest

The common law recognized that people do not normally make statements contrary to their own interest unless they believe them to be true.<sup>1</sup> Based upon this insight, the courts evolved a hearsay exception for statements against interest but hedged it with qualifications and restrictions reflecting skepticism about the reliability of this evidence generally. At common law the statement could be against only the declarant's proprietary or pecuniary interest.<sup>2</sup> A statement against penal interest was not recognized.<sup>3</sup> The common law's ambivalence may have had less to do with doubts about the strength of the underlying inference

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dying declarations as well.

<sup>11</sup>Current Fed. R. Evid. 804(b)(2) states:

(2) *Statement Under the Belief of Imminent Death.* In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

##### [Section 8045.4]

<sup>1</sup>Fed. R. Evid. 804(b)(3) advisory

committee's note ("The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true.").

<sup>2</sup>McCormick on Evidence § 317 (7th ed.).

<sup>3</sup>McCormick on Evidence § 318 (7th ed.).

than it did concerns about the circumstances under which such statements are made and the fear that such evidence may be fabricated.<sup>4</sup>

Wis. Stats. § 908.045(4) is identical to the version of the rule proposed by the Supreme Court in its draft of the Federal Rules of Evidence, which Congress later revised. Late amended again, current Fed. R. Evid. 804(b)(3) now states:

**(3) Statement Against Interest.** A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

The current federal rule adopts a "unitary approach," reflected in the case law, that applies the standard of clear corroboration to the prosecution as well as the defense when statements against penal interest are offered to expose a declarant to criminal liability. The revised language applies only to criminal cases, not civil litigation.

The discussion below focuses on the meaning and interpretation of the against-interest exception in both criminal and civil settings. In criminal cases the prosecution's use of hearsay generally, and this exception particularly, also raise serious issues under the Sixth Amendment's confrontation clause as well. This subject is addressed in § 802.301.

Statements against interest should not be confused with admissions by party opponents.<sup>5</sup> A statement against interest, unlike a party admission, must be based on the declarant's firsthand knowledge and the declarant must be unavailable to testify under Wis. Stats. § 908.04. Moreover, the admissions exemptions restrict the class of declarants to party opponents or their surrogates.<sup>6</sup>

"Self-interest" is an amorphous concept, and therefore the rule

<sup>4</sup>State v. Anderson, 141 Wis. 2d 653, 663, 416 N.W.2d 276, 280 (1987).

<sup>5</sup>State v. Pepin, 110 Wis. 2d 431, 433, 328 N.W.2d 898, 899 (Ct. App. 1982) (where defendant attempted to introduce his own statement given to the police during interrogation, the court observed that it was not admissible as an admission by a party opponent; the court also rejected its prof-

fer as a statement against interest).

<sup>6</sup>Nor must a party admission have been against the opponent's interest when made. The Judicial Council Committee's Note to Wis. Stats. § 908.045(4) raised this point and quoted from an earlier edition of McCormick to emphasize the distinction.

See McCormick on Evidence § 316 (6th ed.).

sets forth specific categories. Implicit is a showing, usually circumstantial, that the declarant was aware the statement was against interest when making it.<sup>7</sup> In addition to penal, proprietary, or pecuniary interests, the rule encompasses statements that tend to render invalid a claim by the declarant against another, or that tend to subject the declarant to civil or criminal liability.<sup>8</sup> The exception also recognizes that statements made against one's "social interests" carry similar indicia of reliability when they subject the declarant to hatred, ridicule, or disgrace.<sup>9</sup>

<sup>7</sup>State v. Sorenson, 143 Wis. 2d 226, 241, 421 N.W.2d 77, 83 (1988) (Wis. Stats. § 908.045(4) "specifically requires" a showing that the declarant was aware that the statement was against interest when made, but the court declined to analyze the hearsay under this particular exception, admitting it instead under the residual exception of Wis. Stats. § 908.045(6); the statements were made by a child sexual assault victim and implicated her father in the assault).

<sup>8</sup>See Wis. Stats. § 908.045(4) Judicial Council Committee's Note ("Changes effected by this sub. which expand the concept of 'against pecuniary or proprietary interest' to civil or criminal liability, rendering invalid a claim by the declarant against another, or making the declarant the object of hatred, ridicule or disgrace have not been the subject of prior Wisconsin adjudication but are changes in general common law.").

See also Fed. R. Evid. 804(b)(3) advisory committee's note (citations omitted):

The common law required that the interest declared against be pecuniary or proprietary but within this limitation demonstrated striking ingenuity in discovering an against-interest aspect. The exception discards the common law limitation and expands to the full logical limit. One result is to remove doubt as to the admissibility of declarations tending to establish a tort liability against the declarant or to extinguish one which might be asserted by him in accordance with the trend of the decisions in this country. McCormick, Sec. 254, pp. 548-549. . . . And finally, exposure to criminal li-

ability satisfies the against interest requirement. The refusal of the common law to concede the adequacy of a penal interest was no doubt indefensible in logic, see the dissent of Mr. Justice Holmes in *Donnelly v. United States*, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed. 820 (1913). . . .

<sup>9</sup>See *Muller v. State*, 94 Wis. 2d 450, 463, 289 N.W.2d 570, 576 (1980) (deposition given during a child custody action between declarant and criminal defendant was against declarant's interest, since she admitted having had sexual relations with another man; these statements subjected her to criminal liability, made her an "object of disgrace" and "were even against her proprietary interest since they provided a foundation for depriving her of custody of her daughter").

<sup>10</sup>State v. Buelow, 122 Wis. 2d 465, 477, 363 N.W.2d 255, 262 (Ct. App. 1984) (The declarant "gave statements which would make her the object of hatred and quite possibly would subject her to danger from others involved in Posse Comitatus activity.").

A troublesome case that explores the border between a statement against interest and one that reveals only disturbing or worrisome facts is *State v. Stevens*, 171 Wis. 2d 106, 490 N.W.2d 753 (Ct. App. 1992), where defendant was charged with arson, burglary, and receiving stolen property. The state offered statements made by the defendant's young stepdaughter to her friend, the state's witness. The witness testified that one day, while walking home from school, the stepdaughter told her that on that previous evening the defendant had

admitted he had stolen some stereo equipment. The same witness also testified that about one month after this conversation she observed stereo equipment in the defendant's home. The stepdaughter was found dead about three months after the conversation; the witness then reported it to police. The trial court admitted the statement under Wis. Stats. § 908.045(4) because the statement subjected the stepdaughter to hatred, ridicule, or disgrace.

The court held that the "social interest" category of this rule has an objective pole (the declarant must actually face hatred, etc.) and a subjective pole (involving the declarant's appreciation of the risk of hatred, etc.). The court explained why the stepdaughter's statement did not qualify under this exception:

We conclude that [the stepdaughter Melissa's] risk of hatred, ridicule or disgrace was too attenuated and uncertain to guarantee her statement's reliability. In the larger community, Melissa was likely to receive praise rather than disapproval if her statement became known. A negative reaction was more likely from Melissa's mother than from the larger community, but not so certain as to give us confidence that Melissa's statement was true. Furthermore, any social disapproval potentially coming to Melissa from her mother is like the disapproval that would come to her from her stepfather. It would simply be based on the fact that she accused her stepfather of wrongdoing. The exception swallows the rule if hearsay testimony can be admitted whenever the declarant faces social disapproval simply for making an accusation. The accused and those close to the accused will always resent the person who makes the accusation.

We also conclude that the real issue in regard to the social interest exception is not the size of the community that might react with hatred, ridicule or disgrace toward the declarant. Rather, the real issue is the extent of the declarant's personal connection to the activity reported in his or her

declaration. Just as is the case for statements against penal or proprietary interest, the social interest exception demands that the declarant have a personal interest in keeping the statement secret. It is that personal interest that guarantees reliability. Without this requirement for personal connection to the event or activity reported in the hearsay statement, the social interest exception would permit the admission of any statement where it can be shown that the declarant will be intensely disliked by someone for making the statement.

490 N.W.2d at 759.

Compare *Stevens* with *State v. Murillo*, 2001 WI App 11, ¶¶ 17-18, 240 Wis. 2d 666, 623 N.W.2d 187 (Ct. App. 2000), upholding the admission of a statement against social interest made by the defendant's brother, who witnessed the murder, and whose "actions, words, and demeanor" when interrogated by police met the subjective and objective poles set forth in *Stevens*:

¶ 17 We are convinced that Luis's actual state of mind was on display in testimony before the trial court. Here was Luis, faced with the difficult dilemma of whether to turn in his brother, a fellow gang member to boot. It is not difficult to ascertain that a reasonable person in Luis's position would feel he or she would be the object of "hatred, ridicule or disgrace" from family members and members of the gang. A reasonable person in Luis's position would understand that those who Luis is most likely to interact with and hold in high esteem would probably perceive him as disloyal and his act one of betrayal if he told police what he knew. Eddie would resent Luis for turning on him. The family would likely hold Luis responsible for separating Eddie from the family if Luis told the police what happened. Luis's fellow gang members would likely be angered by Luis's conduct. Therefore, the objective prong is satisfied.

*Murillo* at ¶ 17. When Eddie made his statement to police, he cried, paced, prayed, and ultimately collapsed on the floor. ¶ 18. In short, the trial court "was able to gain insight into Luis's

Although the categories undoubtedly overlap, the proponent should identify the particular brand of self-interest that purportedly satisfies the exception. This is a preliminary question of admissibility for the trial judge to determine in accordance with Wis. Stats. § 901.04(1). The judge must be convinced that all foundational elements are present by a preponderance of the evidence. This determination will undoubtedly rest on the judge's assessment of the statement itself, and the surrounding circumstances, as viewed through her common sense and life experiences. It is, of course, an exercise of discretion that will be respected as such on appeal.

Wis. Stats. § 908.045(4) applies to a statement that at the time of its making was so far contrary to the declarant's self-interest that a reasonable person in the declarant's position would not have made the statement unless he believed it to be true. The statement must have been against interest *at the time it was made* because the exception is premised upon the idea that reasonable people do not speak against their interests unless they are telling the truth.<sup>10</sup> The against-interest element applies to every *single* statement proffered under this rule; thus, the proponent must first identify the particular statements and then demonstrate that each one satisfies the rule.

A frequently recurring problem concerns statements that are partially against interest and partially self-serving when made. The question then becomes whether the exception should admit only the part that was against interest, the entire statement, or none of it. Although Wis. Stats. § 908.045(4) is silent on this troublesome point, the proper test is one that was used prior to the adoption of this rule.<sup>11</sup> The Wisconsin Supreme Court explained:

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actual mental state and so have we. The subjective prong is satisfied." ¶ 19.

<sup>10</sup>State v. Tucker, 2003 WI 12, ¶ 32, 259 Wis. 2d 484, 657 N.W.2d 374 (2003) (trial court properly excluded hearsay statements made by an unavailable witness to a defense investigator; in general, the statements attempted to exculpate the defendant without inculpating the witness and the trial court properly found that they were not "clearly against his penal interest"). *Compare* U.S. v. Awer, 770 F.3d 83, 93–94, 95 Fed. R. Evid. Serv. 1109 (1st Cir. 2014) (declarant's statements to her own attorneys were not against interest because they were privileged when made) *with* U.S. v.

Ocasio-Ruiz, 779 F.3d 43, 47, 96 Fed. R. Evid. Serv. 1150 (1st Cir. 2015) (declarant's statement to his own mother confessing the murder was sufficiently against interest and corroborated).

State v. Bembeneck, 140 Wis. 2d 248, 409 N.W.2d 432 (Ct. App. 1987) (statement made by declarant stating that he committed the murder and that defendant was not involved failed to meet the reasonable person standard where the declarant was serving a sentence of life plus 26 years when he made the statement).

<sup>11</sup>Wis. Stats. § 908.045(4) Judicial Council Committee's Note ("This sub. does not modify the rule of [Meyer v.

We do not hold a statement to constitute a declaration against interest must be made to one adverse to the declarant. It may also be made to one united in interest or to a neutral party. *Musha v. United States Fidelity & Guaranty Co.*, 10 Wis. 2d 176, 102 N.W.2d 243 [(1960)]. But the entire statement, or those parts sought to be admitted, ought to be made under such circumstances as will impart trustworthiness and credit to it as well as to the part against interest. The preferable rule to be applied in this case is well stated in Rule 509(2) of American Law Institute, Model Code of Evidence, on page 255:

(2) . . . evidence of so much of a hearsay declaration is admissible as consists of a declaration against interest and such additional parts thereof, including matter incorporated by reference, as the judge finds to be so closely connected with the declaration against interest as to be equally trustworthy.<sup>12</sup>

This test has been applied with approval in cases construing Wis. Stats. § 908.045(4).<sup>13</sup>

The Supreme Court has construed the federal exception for statements against interest along the same lines. In *Williamson v. United States*<sup>14</sup> the Court held that the "most faithful reading of Rule 804(b)(3) is that it does not allow admission of non-self-inculpative statements, even if they are made within a broader narrative that is generally self-inculpative."<sup>15</sup> The Court also explained that "[n]othing in the text of Rule 804(b)(3) or the general theory of the hearsay Rules suggests that admissibility should turn on whether a statement is collateral to a self-

*Mutual Service Cas. Co.*, 13 Wis. 2d 156, 163, 108 N.W.2d 278, 281 (1961)] that evidence of so much of a hearsay declaration is admissible as consists of a declaration against interest and such additional parts thereof, including matter incorporated by reference, as the judge finds to be so closely connected with the declaration against interest as to be equally trustworthy.").

<sup>12</sup>*Meyer v. Mutual Service Cas. Co.*, 13 Wis. 2d 156, 164, 108 N.W.2d 278, 282 (1961).

<sup>13</sup>*State v. Buelow*, 122 Wis. 2d 465, 476, 363 N.W.2d 255, 263 (Ct. App. 1984) (declarant's testimony during a John Doe investigation implicated the defendant as well as herself in criminal activity; held that her testimony about defendant's involvement was so closely connected with the "against interest" part of her state-

ment that they were admissible, citing *Meyer*).

*State v. Pepin*, 110 Wis. 2d 431, 433, 328 N.W.2d 898, 899 (Ct. App. 1982) (murder prosecution in which defendant attempted to introduce his own post-arrest statement to police in which he admitted to involvement in the armed robberies but denied being the shooter; quoting *Meyer*, the court held that defendant's motive to falsify his own role pervaded all parts of the statement, thus trial court did not err in excluding it as hearsay, where the state did not offer it as an admission by a party opponent, Wis. Stats. § 908.01(4)(b)1).

<sup>14</sup>*Williamson v. U.S.*, 512 U.S. 594, 114 S. Ct. 2431, 129 L. Ed. 2d 476, 39 Fed. R. Evid. Serv. 589 (1994).

<sup>15</sup>*Williamson v. United States*, 114 S.Ct. at 2435.

inculpatory statement.”<sup>16</sup> In short, the Court saw “no reason why collateral statements, even ones that are neutral as to interest, should be treated any differently from other hearsay statements that are generally excluded.”<sup>17</sup> Wisconsin case law had followed this approach even before *Williamson*; thus, its adoption by Wisconsin cases has posed no problems.<sup>18</sup>

One recurring scenario involves defendants who make statements to police that are part inculpatory and part exculpatory,

<sup>16</sup> *Williamson v. United States*, 114 S.Ct. at 2435. The Court offered the following examples (i.e., “dicta”) of “statements that inculpate a criminal defendant” that “may be admissible”:

For instance, a declarant’s squarely self-inculpatory confession—“yes, I killed X”—will likely be admissible under Rule 804(b)(3) against accomplices of his or who are being tried under a co-conspirator liability theory. Likewise, by showing that the declarant knew something, a self-inculpatory statement can in some situations help the jury infer that his confederates knew it as well. And when seen with other evidence, an accomplice’s self-inculpatory statement can inculpate the defendant directly: “I was robbing the bank on Friday morning,” coupled with someone’s testimony that the declarant and the defendant drove off together Friday morning, is evidence that the defendant also participated in the robbery.

Moreover, whether a statement is self-inculpatory or not can only be determined by viewing it in context. Even statements that are neutral may actually be against the declarant’s interest. “I hid the gun in Joe’s apartment” may not be a confession of a crime; but if it is likely to help the police find the murder weapon, then it is certainly self-inculpatory. “Sam and I went to Joe’s house” might be against the declarant’s interest if a reasonable person in the declarant’s shoes would realize that being linked to Joe and Sam would implicate the declarant in Joe and Sam’s conspiracy. And other statements that give the police significant details about the crime may also, depending on the situation, be against the declarant’s interest. The question under Rule 804(b)(3) is always whether the statement was sufficiently against the declarant’s penal interest “that a reasonable

person in the declarant’s position would not have made the statement unless believing it to be true,” and this question can only be answered in light of all the surrounding circumstances.

114 S.Ct. at 2436–37 (citation omitted). In a separate opinion, Justice Scalia offered several other examples intended to elucidate the Court’s exposition of the “against interest” exception. 114 S.Ct. at 2438, Scalia, J., concurring. The bottom line is that courts are wary of superficially inculpatory statements which, in context, appear to be efforts by the declarant/accomplice to minimize his own culpability or penal exposure.

<sup>17</sup> *Williamson v. United States*, 114 S.Ct. at 2435 (citation omitted). The Court also reviewed the advisory committee’s note, concluding that it was not “particularly clear” and “that the policy expressed in the statutory text points clearly enough in one direction that it outweighs whatever force the Notes may have.” 114 S.Ct. at 2436.

<sup>18</sup> *State v. Jackson*, 2007 WI App 145, ¶ 20, 302 Wis. 2d 766, 735 N.W.2d 178 (Ct. App. 2007) (felon in possession of firearm prosecution where the defense sought to introduce an unavailable declarant’s statement to the effect that it was a third-party, not the defendant, who handled the weapon; relying on *Williamson*, the court held that the statement not against the declarant’s penal interest).

*State v. Joyner*, 2002 WI App 250, ¶ 18, 258 Wis. 2d 249, 653 N.W.2d 290 (Ct. App. 2002). *State v. King*, 205 Wis. 2d 81, 555 N.W.2d 189, 195 (Ct. App. 1996) (discussing and applying *Williamson*).

and later seek to use the exculpatory ones at trial (usually hoping to avoid testifying). For example, assume a defendant admits to police that he participated in a robbery but denies any role whatsoever in the victims' murder by an alleged accomplice. The defendant is nevertheless charged with robbery and murder, pleads guilty to robbery, and elects trial on the murder charge. At the murder trial the defendant attempts to elicit the detective's testimony about his post-arrest statement that acknowledges guilt in the robbery but denies any role in the murder. The cases have correctly determined that the "exculpatory" features of such statements fall outside of the penal interest exception.<sup>19</sup>

Another recurring scenario involves inculpatory statements by third parties. The prosecution usually offers such statements because they somehow implicate the defendant on trial as well as the declarant (this was the scenario in *Williamson*). In practice prosecutors will resort to this exception only where the hearsay cannot be offered under some other rule, such as the coconspirator exemption. A key consideration is the declarant's motivation in making the statement. Statements against interest that evenly spread culpability between the declarant and the criminal defendant pose fewer problems than those that direct most of the blame at the defendant and away from the declarant.<sup>20</sup> Nevertheless, *Williamson* demands a finding that each statement, under all the circumstances, be so far contrary to the declarant's penal interest that a reasonable person in the declarant's position would not have said it unless the statement was true.<sup>21</sup> Finally, statements made by accomplices to law enforcement authorities during post-arrest interrogation are presumptively suspect and trigger a host of constitutional protections in addition to these evidentiary rules.<sup>22</sup>

Criminal defendants may proffer third party "confessions"

<sup>19</sup>State v. Pepin, 110 Wis. 2d 431, 433, 328 N.W.2d 898, 899 (Ct. App. 1982) (murder prosecution wherein the defendant attempted to introduce his own post-arrest statement; the statement failed to qualify under this exception, since the entire statement was colored by the defendant's strong motive to lie about his involvement in the offense).

<sup>20</sup>State v. Peck, 143 Wis. 2d 624, 422 N.W.2d 160, 168 (Ct. App. 1988) (in prosecution for manufacture of a controlled substance, declarant became unavailable by asserting her fifth amendment right; police officer testified that declarant told him that

she lived on the property with defendant and they were growing marijuana); State v. Buelow, 122 Wis. 2d 465, 476, 363 N.W.2d 255, 263 (Ct. App. 1984) (declarant recounted her involvement in arson and bombing scheme in testimony at a John Doe hearing and in other statements to police).

<sup>21</sup>*Williamson v. United States*, 114 S.Ct. at 2436-37 (quoted above). See also *State v. King*, 205 N.W.2d at 195.

<sup>22</sup>See § 802.3. See *Lee v. Illinois*, 476 U.S. 530, 106 S. Ct. 2056, 90 L. Ed. 2d 514, 20 Fed. R. Evid. Serv. 513 (1986); *Cruz v. New York*, 481 U.S. 186, 192, 107 S. Ct. 1714, 1719, 95 L.

when they tend to be exculpatory; that is, if the third party's statement is true, the defendant is absolved of criminal liability. The exculpation may occur explicitly, as where the declarant affirmatively denies the defendant's involvement, or implicitly where the declarant's confession logically excludes any role by the defendant in the crime.<sup>23</sup> Wis. Stats. § 908.045(4) requires corroboration for any statement tending to expose the declarant to criminal liability and offered to exculpate the accused. The cases hold that "the standard of corroboration is corroboration sufficient to permit a reasonable person to conclude, in light of all the facts and circumstances, that the statement could be true."<sup>24</sup>

The corroboration may come from *any source*; it need not emanate from an "independent source" (i.e., one that is "external" to the hearsay statement itself):

Although corroboration will usually be contained in evidence that is external to the statement itself, a requirement that corroboration *must always* be "independent" would be arbitrary. That a declarant's

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Ed. 2d 162, 22 Fed. R. Evid. Serv. 369 (1987).

<sup>23</sup>See, e.g., *Boyer v. State*, 91 Wis. 2d 647, 660, 284 N.W.2d 30, 35 (1979) ("If, as Peter Korn stated on several occasions, he did kill Veronica Blessinger, then the statements were exculpatory as to the defendant and material and relevant. When the guilt of another person is inconsistent with the guilt of the defendant, it is relevant for the defendant to present evidence that such other person committed the crime.; statements excluded on other grounds") (citation omitted).

*State v. Frambs*, 157 Wis. 2d 700, 460 N.W.2d 811, 813 (Ct. App. 1990) (defendant sought to introduce statement by third party which implicated another person in the offense; held that since the defendant had "procured" the absence of the declarant by threatening him, the declarant was not unavailable within the meaning of Wis. Stats. § 908.04).

<sup>24</sup>*State v. Anderson*, 141 Wis. 2d 653, 660, 416 N.W.2d 276, 279 (1987) (prosecution for various offenses arising out of defendant's possession of an illegal shotgun; defendant claimed "privilege" with respect to the possession of the gun, and the court held that error occurred when the trial court excluded statements made by the de-

fendant's brother, who owned the gun and who was with defendant when arrested, asserting that defendant had indeed taken the gun from him [the brother] in order to protect third persons involved in a gambling game; sufficient corroboration found in the record). The *Anderson* decision comprehensively explains the meaning of the Wisconsin rule and adds the perspective of the federal rule and related constitutional concerns. The court overruled *Ryan v. State*, 95 Wis. 2d 83, 289 N.W.2d 349 (Ct. App. 1980) (overruled by, *State v. Anderson*, 141 Wis. 2d 653, 416 N.W.2d 276 (1987)) to the extent that it was inconsistent with *Anderson*. 141 Wis. 2d at 666.

See *State v. Whitaker*, 167 Wis. 2d 247, 481 N.W.2d 649 (Ct. App. 1992) (defendant claimed that trial court erroneously excluded an exculpatory statement—written and notarized—by one Harris; the statement was inconsistent with Harris' prior statement to police and Harris asserted his right to silence and refused to testify at the trial; applying *Anderson*, the court of appeals held that the trial court acted properly in finding that no reasonable person could conclude that the exculpatory statement was true).

confession is repeated to more than one witness may well be sufficient, in light of all the facts and circumstances, to permit a reasonable person to conclude that it could be true, even in the absence of corroboration that is "independent" of the confession itself. In this sense, the statement against penal interest may be sufficiently "self-corroborating," under the circumstances, by virtue of having been repeated in substantially the same form to a second or third witness.<sup>25</sup>

Wis. Stats. § 908.045(4) differs from Fed. R. Evid. 804(b)(3), which demands that the corroboration "clearly indicate" trustworthiness.<sup>26</sup> The court explained the policy behind the Wisconsin rule of simple corroboration:

The enunciated standard achieves a proper balance between these competing policy concerns. It acknowledges the sometimes critical need for the hearsay statement by not subjecting the defendant to an insurmountable evidentiary hurdle for admissibility . . . . It reduces the risk of fabrication by requiring that the statement itself permits a reasonable person to conclude in light of all the facts and circumstances that the statement could be true. We note also that other safeguards exist for circumventing fabrication. For example, the judge may exclude the hearsay statement if the judge finds that its probative value is outweighed by its tendency to mislead to [sic] jury. [Wis. Stats. § 904.03].<sup>27</sup>

The corroborating evidence need meet only the conditional relevancy standard of § 901.04(2); it need not be "undisputed" or otherwise free from challenge. Put differently, the prosecution will undoubtedly attack the corroborating evidence for a variety of reasons (e.g., the witness is mistaken or lying), yet the corroboration may still meet the threshold standard:

Nothing in *Anderson* or [Wis. Stats. § 908.045(4)] requires the exclusion of a hearsay statement against penal interest merely because there is conflicting evidence in the record—that is, where the corroboration is "debatable." If this were true, then no corroboration would ever be sufficient, because the declarant's self-inculpatory statement is being offered to exculpate the accused and is therefore by definition inconsistent with at least some of the state's evidence, and hence any corroboration of the statement will necessarily be

<sup>25</sup>State v. Guerard, 2004 WI 85, 273 Wis. 2d 250, 682 N.W.2d 12 (2004).

<sup>26</sup>See U.S. v. Henderson, 736 F.3d 1128, 1131 (7th Cir. 2013) (discussing Fed. R. Evid. 804(b)(3)'s corroboration requirement, which does not require corroboration of the statement itself, and which "may be supplied by independent evidence supporting the statement itself, or by the circumstances in

which the statement was made suggesting that the statement is trustworthy, or both"; the judge need not be "completely convinced of the truth of the statement") (internal quotations omitted).

<sup>27</sup>State v. Anderson, 141 Wis. 2d 653, 664, 416 N.W.2d 276, 280-81 (1987).

“debatable.”<sup>28</sup>

It should be observed that in dealing with exculpatory statements under this exception, the trial court must apply two different reasonable person tests. The first one focuses on the “against interest” aspect of the statement, and requires the trial judge find that it was so far contrary to the declarant’s interest that a reasonable person would not have made it unless he believed it to be true. If this test is satisfied, the trial court must then scrutinize the corroborating evidence and decide whether, as it relates to the hearsay, a reasonable person could conclude that the hearsay could be true.<sup>29</sup> The role of the trial judge is to decide upon the admissibility of the evidence. The proper weight to be given this evidence is for the trier of fact.<sup>30</sup>

#### § 908.045(5) STATEMENT OF PERSONAL OR FAMILY HISTORY OF DECLARANT

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

**(5) Statement of personal or family history of declarant.** A statement concerning the declarant’s own birth, adoption, marriage, divorce, relationship by blood, adoption or marriage, ancestry, whether the person is a marital or nonmarital child, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated.

<sup>28</sup>State v. Guerard, 2004 WI 85, ¶ 33, 273 Wis. 2d 250, 682 N.W.2d 12 (2004).

<sup>29</sup>State v. Bembenek, 140 Wis. 2d 248, 253, 409 N.W.2d 432, 434 (Ct. App. 1987) (pre-*Anderson* case in which the court found no “meaningful” corroboration of a third person’s confession to the murder for which defendant had been convicted; the declarant’s “information” about the offense was available through media sources and his “presence” in Milwaukee at about the time of the murder was not sufficient given the population of 500,000).

<sup>30</sup>State v. Anderson, 141 Wis. 2d 653, 665–66, 416 N.W.2d 276, 281–82 (1987). But see State v. Johnson, 181 Wis. 2d 470, 510 N.W.2d 811, 814–16 (Ct. App. 1993) (holding that the cor-

roboration requirement presents an issue of conditional relevancy under Wis. Stats. § 901.04(2); accordingly, the judge need only determine that a jury acting reasonably could find that corroboration exists by a preponderance of the evidence; based on the record, the court held that the trial judge did not abuse his discretion in excluding the proffered statement).

In *State v. Guerard*, 2004 WI 85, ¶ 34, 273 Wis. 2d 250, 682 N.W.2d 12 (2004) the supreme court limited *Johnson*: “to the extent that *Johnson* is interpreted as always requiring corroboration “independent” of the statement against penal interest itself, it is inconsistent with *Anderson*, which placed no such limitation on the nature of the corroboration required under [Wis. Stats. § 908.045(4)].”

## AUTHOR'S COMMENTS

## § 8045.5 Statement of personal or family history of declarant

## § 8045.5 Statement of personal or family history of declarant

This rule should be viewed in context with the five other hearsay exceptions in Wis. Stats. § 908.03 that also deal with aspects of personal and family history.<sup>1</sup> Wis. Stats. § 908.045(5) eliminated the common law requirement that such statements had to have been made prior to any motive to litigate.<sup>2</sup> This exception applies only to statements describing the declarant's own personal or family history.

Specifically, the rule provides an exception for statements concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption or marriage, ancestry, or other similar fact of personal or family history. Moreover, the proponent need not demonstrate the declarant's personal knowledge of these events, contrary to the general rule requiring such a showing. The federal advisory committee explained that this was done because "[i]n some instances it is self-evident (marriage) and in others impossible and traditionally not required (date of birth)."<sup>3</sup>

This exception, then, permits the seemingly unremarkable spectacle of the witness testifying to her own date of birth. Such testimony is necessarily dependent upon hearsay because, after all, everyone of us learned our birthdays by being told what it is. This rule comported with prior Wisconsin case law.<sup>4</sup> This rule, like other hearsay exceptions, is limited to the hearsay issue. Such statements must still be relevant and not subject to exclusion by other rules, such as the rule barring character evidence.<sup>5</sup>

## [Section 8045.5]

<sup>1</sup>Wis. Stats. §§ 908.03(11) (records of religious organizations); 908.03(12) (marriage, baptismal, and similar certificates); 908.03(13) (family records); 908.03(19) (reputation concerning personal or family history); § 908.03(23) (judgment as to personal, family or general history, or boundaries).

<sup>2</sup>See Wis. Stats. § 908.045(5) Judicial Council Committee's Note ("The elimination of the *ante litem motam* requirement is a change in Wisconsin law . . .").

Fed. R. Evid. 804(b)(4) advisory

committee's note (the litigation motive bears more appropriately on weight than admissibility).

<sup>3</sup>Fed. R. Evid. 804(b)(4) advisory committee's note.

<sup>4</sup>Wis. Stats. § 908.045(4) Judicial Council Committee's Note (citing earlier cases in accord with these provisions).

<sup>5</sup>See *State v. Jacobs*, 2012 WI App 104, ¶ 27, 344 Wis. 2d 142, 822 N.W.2d 885 (Ct. App. 2012), (in a homicide by intoxicated user prosecution which raised questions of ineffective assistance of counsel, testimony by victim's mother about her son's good

**§ 908.045(5m) STATEMENT OF PERSONAL OR FAMILY HISTORY OF PERSON OTHER THAN THE DECLARANT**

**(5m) Statement of personal or family history of person other than the declarant.** A statement concerning the birth, adoption, marriage, divorce, relationship by blood, adoption or marriage, ancestry, whether the person is a marital or nonmarital child, or other similar fact of personal or family history and death of a person other than the declarant, if the declarant was related to the other person by blood, adoption or marriage or was so intimately associated with the other person's family as to be likely to have accurate information concerning the matter declared.

**AUTHOR'S COMMENTS**

§ 8045.5m Statement of personal or family history, as to person *other than the declarant*

**§ 8045.5m Statement of personal or family history, as to person *other than the declarant***

This rule provides an exception for statements concerning the same personal and family matters described in § 8045.5 (above) of *another* person, including the other person's death. The declarant must, however, bear a prescribed status to the other person. First, it may be shown that the declarant was related to this other person by blood, adoption, or marriage. Alternatively, it may be shown that the declarant was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared. Where the statement's subject matter concerns a relationship between two other persons (e.g., marriage), the rule requires only that the declarant stand in the requisite status to one of the two persons in the relationship.<sup>1</sup> (Originally Wis. Stats. § 908.045(5m) was a subsection of Wis. Stats. § 908.045(5); its recreation as a separate rule promoted clarity and consistency of style, but did not effect any

character, elicited by the State, was inadmissible; trial counsel's failure to object was not prejudicial in light of the overwhelming evidence against him; in response to the State's argument that the mother's testimony was admissible under Wis. Stats. § 908.045(5m), the court observed that a hearsay exception does not provide an independent grounds for admitting the evidence excluded by other rules: "the mother's testimony was not admissible regardless of the applicability of any

hearsay exceptions").

**[Section 8045.5m]**

<sup>1</sup>Wis. Stats. § 908.045(5) Judicial Council Committee's Note ("There has been no Wisconsin adjudication that the declarant must have the qualifying status with respect to both persons about whose relationship his declaration is admitted.").

Fed. R. Evid. 804(b)(4) advisory committee's note.

substantive change.<sup>2</sup>

This rule, like other hearsay exceptions, is limited to the hearsay issue. Such statements must still be relevant and not subject to exclusion by other rules, such as the rule barring character evidence.<sup>3</sup>

### § 908.045(6) OTHER EXCEPTIONS

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

\* \* \*

**(6) Other Exceptions.** A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

### AUTHOR'S COMMENTS

#### § 8045.6 Other exceptions

#### § 8045.6 Other exceptions

This version of the residual hearsay exception is identical to the one found at Wis. Stats. § 908.03(24). Both rules are discussed at § 803.24 since the courts have evinced no intent or pressing need to distinguish them.

### § 908.05 HEARSAY WITHIN HEARSAY

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in this chapter. (S.Ct. Order, 59 Wis.2d R1, R323)

### AUTHOR'S COMMENTS

#### § 805.1 Multiple hearsay

Many forms of hearsay embrace multiple layers of hearsay. Multiple hearsay is admissible in evidence, provided that the hearsay rule is satisfied as to each level of the hearsay. Wis. Stats. § 908.05 is based on Fed. R. Evid. 805 and was consistent with prior Wisconsin practice.<sup>1</sup>

The rule states that hearsay included within hearsay may be

<sup>2</sup>See 1999 Wis. Act 85, § 178 and § 179.

<sup>3</sup>See State v. Jacobs, 2012 WI App 104, ¶ 27, 344 Wis. 2d 142, 822 N.W.2d 885 (Ct. App. 2012), regard-

less of any hearsay exception, the evidence was excluded by other rules).

[Section 805.1]

<sup>1</sup>Wis. Stats. § 908.05. Judicial Council Committee's Note.